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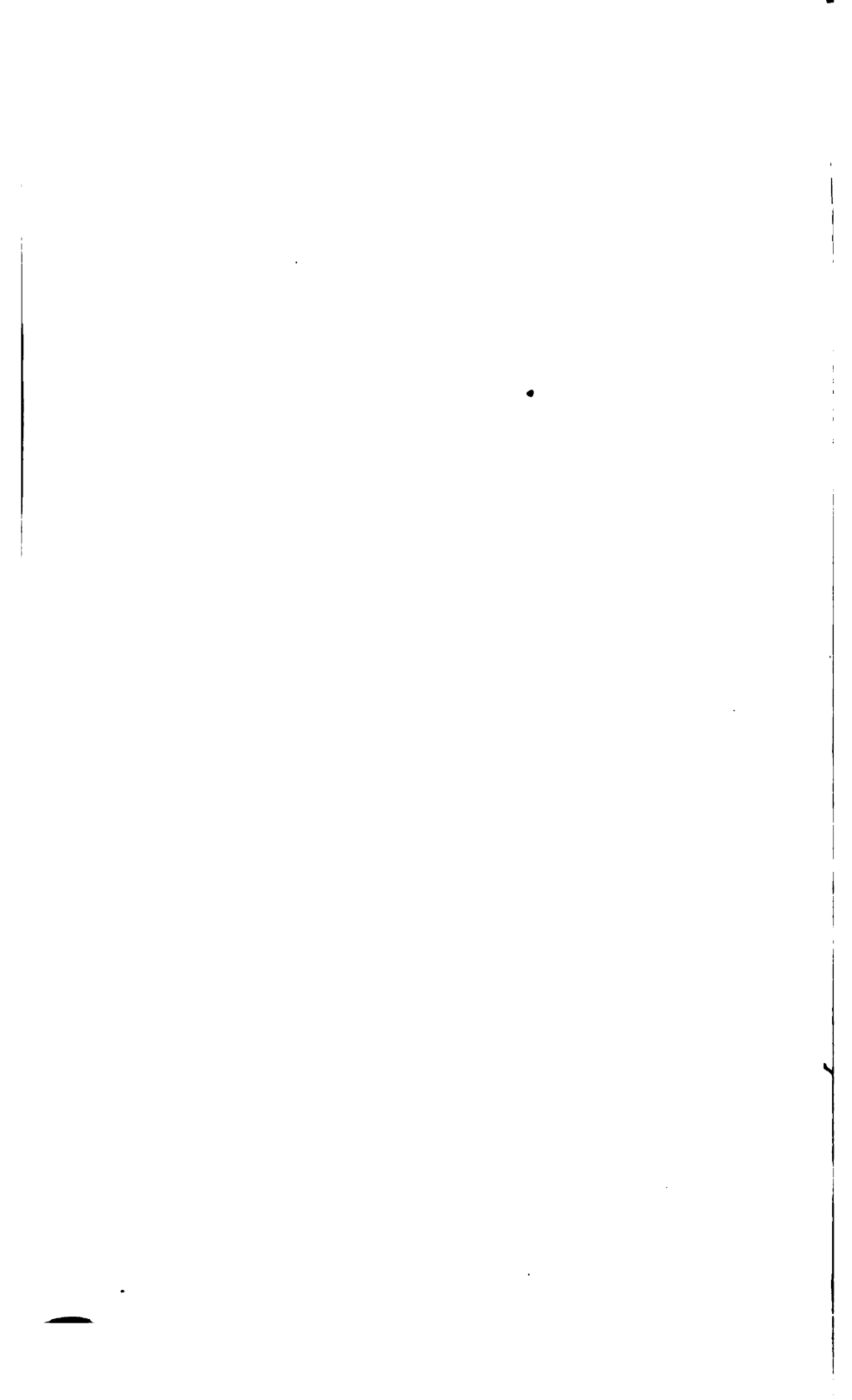


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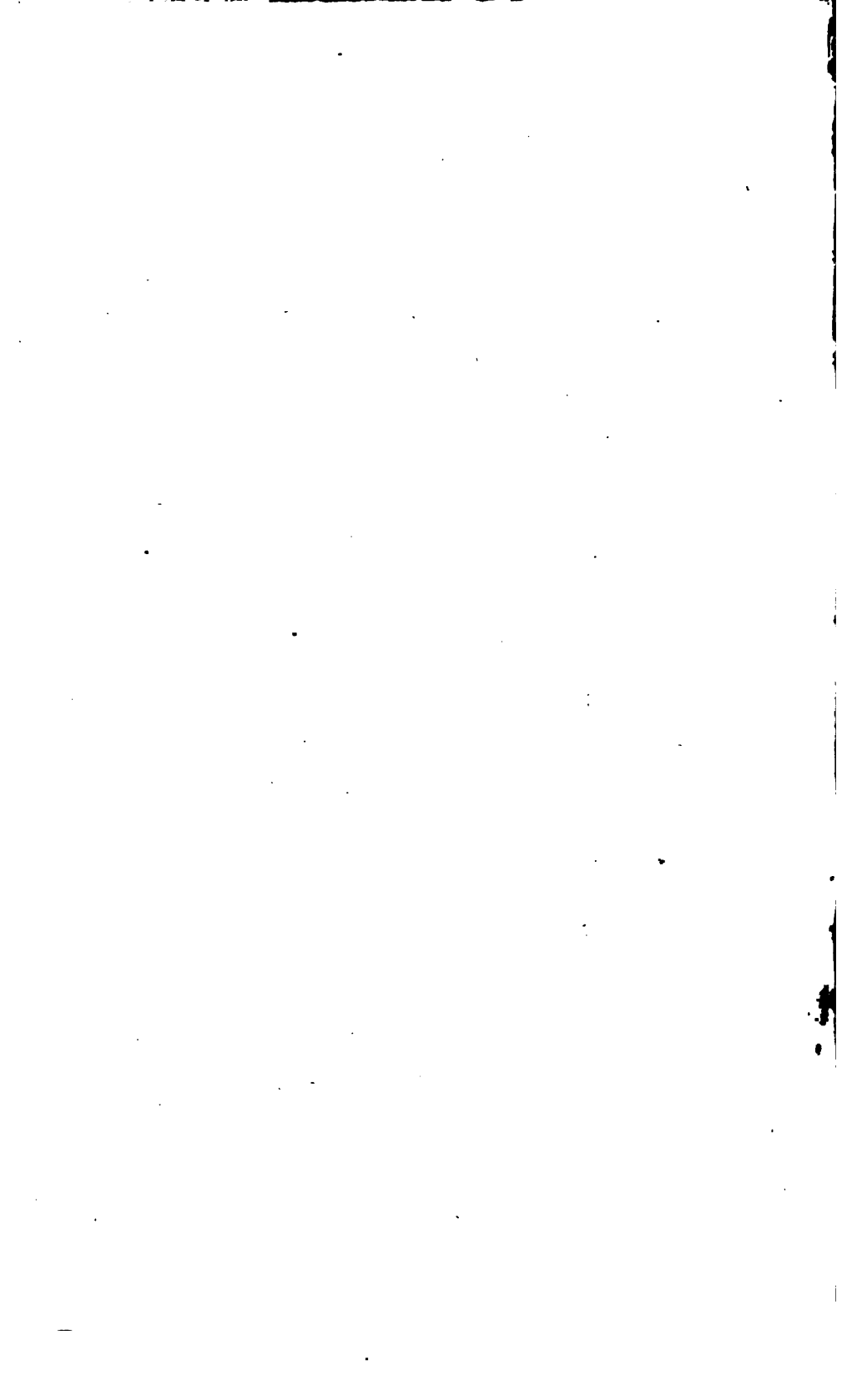


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HUMPHREYS
ON
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OBSERVATIONS

ON THE

ACTUAL STATE OF THE ENGLISH LAWS

OF

REAL PROPERTY;

WITH

THE OUTLINES OF A CODE.

By JAMES HUMPHREYS, Esq.
OF LINCOLN'S INN, BARRISTER.

LONDON:
JOHN MURRAY, ALBEMARLE-STREET.

MDCCCXXVI.

12.6

LONDON:
Printed by WILLIAM CLOWES.
Northumberland-court.

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ERRATA.

Page 23,	line 2,	for <i>in</i> , read <i>on</i> —the like in p. 62, l. 23, p. 137, l. 15, and p. 240, l. 11.
28,	" 5,	for <i>estates</i> , read <i>estate</i> .
45,	" 20,	for <i>Title VIII.</i> , read <i>Title VII.</i>
62,	" 31,	for <i>of</i> , read <i>at</i> .
80,	" 13,	for <i>of the division of actual</i> , read <i>of the actual division of</i> .
93,	" 25,	after <i>is</i> , add <i>the</i> .
97,	" 1,	for <i>retraction</i> , read <i>retraction</i> .
99,	" 1,	for <i>Sect. 7</i> , read <i>Chap. 4</i> .
120,	" 1,	for <i>Sect. 3</i> , read <i>Chap. 5</i> .
125,	" 21,	for <i>anomolous</i> , read <i>anomalous</i> .
127,	" 7,	after <i>may</i> , add <i>be</i> .
128,	" 1,	for <i>Sect. 10</i> , read <i>Chap. 6</i> .
134,	" 16,	for <i>natural</i> , read <i>mutual</i> .
152,	" 26,	for <i>priority</i> , read <i>priority</i> .
173,	" 6,	for <i>lineal transmission</i> , read <i>ascending line</i> .
175,	" 26,	for <i>measures</i> , read <i>measures</i> .
181,	" 13,	for <i>is</i> , read <i>are</i> .
185,	" 2,	for <i>in</i> , read <i>of</i> .—L. 16, for <i>laws</i> , read <i>law</i> , and L. 25, for <i>37</i> , read <i>38</i> .
189,	" 22,	for 40, read 41.
195,	" 15,	for '12 and 14,' read '12, 14, and 15.'
200,	" 8,	for <i>statutory</i> , read <i>statutory</i> .
202,	" 26,	for <i>some</i> , read <i>one</i> .
222,	" 3,	for <i>sustained</i> , read <i>sustains</i> .
227,	" 18,	for 44, 45, 46, read, 45, 46, 47.
235,	" 21,	omit 45.
238,	" 10,	for <i>could</i> , read <i>would</i> .
240,	" 7,	after <i>existence</i> , add <i>or conceived</i> .
271,	" 8,	add <i>77</i> .
276,	" 8,	for '43, 44, 45,' read '43, 43, 44.'
283,	" 19,	for <i>petition</i> , read <i>partition</i> .
303,	" 2,	for <i>capacity</i> , read <i>character</i> .
316,	" 14,	for <i>daies</i> , read <i>dates</i> .

PART I.

OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY.

INTRODUCTION.

FAR from being cultivated on general principles, jurisprudence has, with a few exceptions, and till within a recent period, been viewed as consisting of a series of positive institutions, of a local, or at most of a national character.

The effects of this contracted mode of treatment have, however, been different on political institutions, and on those which regard property. The former are, in their nature, comparatively simple, and they necessarily affect the body of the people. When a government possesses the elements, and a people the character, of freedom, it is by the quick perceptions and the energies of the public that political defects are detected, or abuses corrected; and, in laws of this character, it is of more importance that they should each be adapted to the

feelings and habits of the people, than that the whole should be framed in an imagined harmony of parts. Some nations secure their freedom by holding in their own hands the public purse; others, by personal privileges against the executive. Trial by jury, however strong a bulwark in some constitutions, does not necessarily accompany representative government, though equally proceeding with it from the principle of self-control. There are countries, for instance Prussia, where *civil* justice is said to be administered with such impartial exactitude, and insisted upon with such jealousy, as to afford to the private citizen a tolerable substitute for political rights. On the other hand, the almost absolute freedom from arrest in civil cases, established by the Code Napoleon(a), has excited no sentiment of sanctity towards the person of the French citizen in constitutional struggles with the state.

Of the members of any community, however, but few are proprietors. The laws of property, more especially those regarding land, are complex in their nature; vary with the extent of territory, and the habits of each state; and present, at first sight, no features of a general interest, or capable of being moulded into a system. Failing, then, to interest either the public or the speculatist, and surpassing the grasp of the helpless owner, they

(a) Lib. iii. tit. 16.

have been abandoned to the dispensers and the expounders of the law, who have necessarily confined their attention to precedent and practice. Glaring defects or abuses, indeed, have, from time to time, enforced the interference of the legislature; but, in their remedies, they have only lopped, where they should have extirpated; and the noxious weed has grown by pruning.

But, if system ever be requisite in laws, institutions respecting real property, under its various modifications, both as regards transactions among the living, and the return to the quick from the dead^(a), imperiously demand (and the requisitions are perfectly practicable) that their characters be direct and well defined;—free from mere technical distinctions, whether of tenure, of nominal ownership, or of jurisdiction;—that possessions be kept distinct, unaffected by interfering rights of third persons; that the rules of succession, whether primogeniture or equal partibility prevails, be simple and uniform;—that the power of alienation be unrestrained, and its mode bear immediately on the object;—that the rights of creditors be ample and prompt;—that the periods of prescription, or bar by adverse possession, be clear and of limited extent;—above all that, instead of vainly seeking, by equitable interference, to adapt the crude and scanty institutions of early ages to the complicated

(a) *Le mort saisit le vif*, say the feudal jurists.

relations of cultivated society, one uniform system of laws regulate the whole ;—and that no act be done, nor right conferred, by circuitous means, whether of legal fiction, or nominal interest, where the object may be effected *directly*, with its real name and character.

Of the defects thus alluded to, in institutions respecting real property, and of the supineness of the legislature, and the indifference of the public in correcting them, the laws of *England* afford a signal example.

Passing by the simple rules of ownership under the Anglo-Saxon dynasty, as they may be collected from the relics of their laws, and their extant charters, the *Norman* conquest overwhelmed our landed property with feudal tenures, and their burdensome privileges. These were introduced, not in the spirit of military conquest and partition, on the terms of rallying round the chief, to protect the common acquisitions, but as a system of jurisprudence already established, and even refined upon in their own country, by this proverbially litigious race. They gave us, not the spirit, but the dregs, of that singular system, which has so largely influenced the laws and manners of modern Europe. The extent and variety of the burdens and restrictions of tenure (*fruits*, as they are called) may

be found in all our writers on this branch of jurisprudence; forming, as they did in their primitive vigour, rather an assemblage of unconnected institutions, than parts of a general system. To these were early added, (and their effects are still felt,) the devices of ecclesiastical bodies to amortize land, or appropriate it to themselves in perpetuity. For this purpose, when prevented by the government from acquiring it by direct means, they introduced a variety of inventions; as, leases for long terms of 500 or 1000 years, recoveries in feigned actions at law, grants to nominal holders, *to the use of the religious house*. These uses, which were borrowed from the civil law, were not recognised by the judges of the land, but enforced by the Lord Chancellor, who was then usually of the clergy. The two former practices parliament very early extinguished, as far as they were evasions of the laws against mortmain; though they are still in use as artificial modifications of property. Against equitable uses, too, it interfered; first in the reign of Richard III., and afterwards of that of Henry VIII., but unsuccessfully, since chancery has still preserved them under the name of *Trusts*.

By the reduction, indeed, of these to a system, they have assumed a settled character. They, however, still form a body of laws, distinct from, but operating concurrently, and occasionally in conflict, with the rules of common law; not only over the same property, but even over the different

modifications of it in the same instrument. This breach of our law presents, perhaps, a solitary instance in modern jurisprudence, where the niceties of the feudal and the civil laws occur in the same system.

The intricacies and burdens of tenure, indeed, were greatly diminished at the Restoration. Much of the original system, however, still remains ; together with many theories, built upon it, and fictions, invented occasionally to elude it. The whole tinctures deeply our laws of landed property ; though discordant from the sentiments and habits of modern society, and even from that leading maxim of modern law, which wisely regards land as a commercial property, and discountenances all undue restriction on its alienation. When, to the above catalogue, we add the various local customs, (having also their origin, for the most part, in the caprices of tenure,) the inaptitude of such a body of law to the purposes of commerce, and to the rights of creditors ; the subtile refinements of uses and trusts ; the distinct and intricate laws of tithes, (as they will be noticed hereafter,) and numerous other servitudes on land, of a less ostensible description, we cannot but be sensible of a dense medium interposed between us and the only legitimate qualities of property ; namely, its capacities of enjoyment, succession, and alienation ; its liability to the debts of the owner, and to his duties to the state.

In the foregoing remarks, I have purposely kept

out of view moveable, or, as our laws term it, personal property; and that for several reasons: it is, in its nature, distinct from land;—it is not the subject of tenure; and, in our law, the mode of succession to it is wholly different from that of land, the latter being regulated by primogeniture among males; but personalty by equal partibility between the nearest relations. These circumstances have generated a distinct body of law, which, though somewhat complex, bears directly upon its objects; and the defects of which might be met by improvements of a much more limited character than those which our code of real property imperatively requires.

OF REAL PROPERTY AND ITS ESSENTIAL QUALITIES.

THIS species of ownership is considered, in the laws of England, as comprising, not only land, with the erections and other improvements upon it, all which are called *corporeal*, but also various rights derived out of it. These consist of privileges for the benefit of strangers ; as rights of way, water, and light. These, and their like, are termed *incorporeal*, in respect of their having no apparent existence but in their enjoyment. In reality, however, instead of constituting property of themselves, they are so many burdens or (as the civilians term them) *servitudes* on the land.

The three privileges enumerated are universal, wherever land is enjoyed in separate property. A fourth may be added, namely, rents, which the habits and convenience of society render also necessary, where for life, or any more limited period ; as during infancy, or marriage.

TITLE I.

OF THE ARTIFICIAL DISTINCTIONS OF REAL PROPERTY IN THE LAW OF ENGLAND; AND HEREIN OF TENURES, USES, AND TRUSTS.

IN addition, however, to the simple and essential characters of land, and burdens on land, the system of tenures, and its consequences, together with the subtilties of uses and trusts, already alluded to, have given rise to other distributions, wholly artificial, of landed property, which will be best explained by a brief account of the operations of each of these three causes.

CHAP. I.—*Of Tenures.*

It was a maxim of tenure, that the tenancy should be always full, that is, there should be always a tenant or a succession of tenants to do the lord's service. Hence land could not be granted, to vest at a future day or on a future event. It was frequently granted, to one for life, with remainder to another in fee. In that case, the immediate tenant, being seised of the property, was intrusted with the protection of the possession. If he

failed in this duty, it was a forfeiture of his estate. It was another rule, that land could only pass by delivery of the possession, or *seisin*, as it is technically called. This was accompanied by a feoffment; of which the livery of seisin was the essential part, the tenant for life accepting it on behalf both of himself and those in remainder; while the deed only authenticated the transaction. This livery passed a fee, either by right or by wrong; since whoever had the seisin was competent to deliver it over. The same effect was attributed to a fine; a species of assurance, whereby the person seised in possession, acknowledged, in a feigned action at law, the right to be in another. The result of these positions was, that an immediate interest in land could only be transferred on the spot, or by a judicial acknowledgment—that all in remainder took through the medium of the delivery of seisin to the first tenant,—that this tenant, being intrusted with the seisin, was competent, by the same mode of feoffment or fine, to transfer it, not merely for his own rightful interest, but absolutely to another. Such an act, indeed, was a forfeiture of his own estate; and if the grantee in remainder was in existence, and his interest was vested, and not depending on a future event, he might enter for the forfeiture. If, however, there was no such grantee, then, from the imaginary ouster or divestment of the seisin on which the limitations depended, and the want of an existing

right of entry to restore it, the contingent remainders were destroyed. The grantor indeed, or his heir, might, in that case, re-enter, the seisin under the grant being at an end; but if the latter colluded with the tenant in possession, the whole grant might be defeated, and a complete estate acquired by wrong, with impunity. After uses were converted into legal interests by the statute of Henry VIII., the effect of this inconvenience was prevented, in settlements to uses, embracing provisions for unborn issue, by limiting to trustees an estate commensurate with that of the immediate tenant for life, for preserving these remainders, with a right of entry for that purpose. This cured the particular evil; but it introduced into settlements another system, that of trusts, in order to remedy the inadequacy of the laws of tenure to the necessary modifications of landed property.

At common law, whatever was vested, in a legal sense, was alienable; and dispositions were effected, where the estate was immediate, by feoffment or fine, with livery of the possession; but, where it was expectant, by grant; as none but the tenant in possession could give seisin. Contingent remainders, however, or eventual interests, were inalienable to third persons; but they might be released, or extinguished in the fee.

These different properties of destructibility and inalienableness in contingent remainders, have occasioned distinctions between them and vested

estates ; and again, between them and the modifications of interests, called springing uses, and executory devises, which will be hereafter noticed. The variety and nicety of these may be best depicted, by referring to two treatises of about half a century old on these subjects, which, for exact arrangement and acuteness of reasoning, stand almost unrivalled in English jurisprudence (*a*). It is to be regretted, that the times were not then ripe for directing the talent that produced them, towards simplifying, instead of systematizing, the refinements of landed property.

CHAP. II.—*Of Uses.*

The next creature of our laws of real property is *Uses*. These, as has been already explained, were of ecclesiastical introduction, for the purpose of eluding the restrictions against mortmain. They were in time adopted by the laity ; partly to avoid the rigour and inconvenience of tenures, and partly as admitting those modifications of property, demanded by the increasing intercourse and wants of society, which were incompatible with the maxims of feudality. After repeated attempts by the legislature to assimilate the two systems, uses were

(*a*) *Fearne on Contingent Remainders, and Executory Devises.*

ultimately converted into legal estates by the statute of 27 Hen. VIII. c. 10. It has been frequently questioned, whether the statute meant to extinguish uses, or to give them legal effect. Whatever was the intention, the latter has certainly been the consequence ; and by means of uses, thus legalized, various modifications of property were introduced, to which the system of tenures was a stranger. For instance, expectant interests by way of use did not require to be preceded by an estate in possession, nor to be a remnant of the original fee, like a remainder at common law ; but they might be limited, upon any future event, happening within the period for which, by the law of entails, property was usually tied up, namely a life or lives in being, and twenty-one years and nine months afterwards, and *that*, although the whole fee in the use was first disposed of, if only defeasibly. They also, in their original character, introduced and afterwards preserved a species of dominion almost unknown at common law, called *powers*. By means of these, a person, having merely a partial interest, or even none whatever, in the land, might dispose of or charge it, in the particular manner authorized. They were dormant till exercised ; and then they operated, to the extent of the disposition, in defeasance of the original interests. Their more particular features will be described hereafter.

Uses, however, when legalized, assumed the properties of estates at common law, to which they were assimilated. The inheritance was subject to

the legal incidents hereafter noticed, of curtesy and dower, in a surviving husband or wife. The partial owner in possession under the use, (called the *cestui que use* in possession) had the same capacity as a similar tenant at common law to destroy the subsequent uses, when bearing the character of contingent remainders. When, however, the whole fee was disposed of, though eventually, as to one and his heirs, if he attained the age of twenty-one ; or defeasibly as to one and his heirs, but if he died under twenty-one, then to another, the subsequent limitations no longer bore any analogy to common-law interests, but were then called *springing* or *executory* uses ; and, as their existence did not technically depend upon the seisin of the tenant in possession, no act of his could destroy them. The same quality, (it may be noticed) and for the same reason, is attributable to *executory* devises, being a similar description of interest created by will. Powers, however, when they operate by way of use, are (with some qualifications) destroyed by the feoffment or fine of the appointor ; and that although he have no such intention, if he be also invested with any estate in possession, as for life, on account of the technical capacity attributed to him of disturbing, by these means, the seisin on which the power depends. If, however, he have no estate whatever, then his power is not affected by any act of ownership assumed by him over the land.

CHAP. III.—*Of Trusts.*

Trusts are what uses were, before they were legalized, a confidence reposed in the grantee of the land, which is enforced by a court of equity only. Their revival was chiefly occasioned by the narrowness of construction which the judges at common law put upon the statute of uses, in two instances. This act, it should be noticed, treats uses and trusts as convertible terms. Notwithstanding this, and the obvious intent to reduce the whole of them to estates at law, it was conceived, that no use could be limited on an use ; and, therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, the courts held, that the statute executed the first use only ; and that the second was a mere nullity. Again, the statute mentions only such persons as were *seised* to the use of others. But of terms of years and other interests short of freehold in land, the person entitled is technically described as *possessed* only, and not seised. To these estates also it was held that the statute did not extend.

Over the interests which were thus excluded from the operation of the statute, equity resumed its ancient jurisdiction ; applying to them the denomination of *trusts*, in contradistinction to legalized uses. They are resorted to for various purposes, to which even uses, now coerced into the strict rules of legal

estates, cannot accommodate themselves. In trusts, the destruction of interests by the ideal disturbance of the seisin is unknown. By means of them a purchaser can protect his land from liability to his wife's dower: a married woman can enjoy it free from the debts and control of her husband: portions are raised through the medium of long terms of years, limited to the trustee: the absolute ownership is vested in the trustee, where he is intended to dispose of it, as for the purpose of sale. Arrangements also, for the benefit of creditors, or of a commercial nature, into which land, buildings, or mines, enter as a subject matter,—can only be conveniently effected through the medium of trusts. All these, and many other dispositions of land, are not only allowable, but essentially necessary for the complete enjoyment of property.

The system however, as it stands, is liable to several objections; for the due understanding of which a few preliminary observations are necessary.

Trusts, in our law, may be divided into *active*, or operative, and *passive*, or formal. The former class consists of trusts, in which some confidence is placed in, or some duty imposed on, the trustee; as, where real property is vested in him for the purposes of sale, and distribution of the produce among creditors, which demands both activity and integrity. This species of trust, or something correspondent to it, appears indispensable in every

system of jurisprudence. The latter, or formal class of trusts, is a mere technical phantom, springing out of our complicated systems of real property; as in the various instances of trustees introduced into a purchase-deed for preventing dower; into assignments of terms for protecting the inheritance; into marriage settlements, for preserving contingent remainders—for securing the jointure—for raising younger children's portions, &c.

Trusts, being a personal confidence, ought to cease with the person of the trustee. Our law, however, continues the estate, though not always the confidence, vested in a deceased trustee, to his heir; or, if it be for a term of years, to his executor or administrator. Still a new trustee is to be appointed, whenever the deed creating the trust, or the refusal or incapacity of the representative requires it. This is effected, either by the parties beneficially interested, if they have a power for that purpose, or else through the circuitous and expensive medium of the court of chancery. To such new trustee the technical property, called the *legal estate*, in whomever resident, is to be conveyed. The heir, however, may be a married woman, an infant, or a lunatic. In the first instance, the fictitious and expensive process of a fine, which will be detailed hereafter, is necessary. In the two latter cases, a conveyance was formerly impracticable; and, consequently, the title of the beneficial owner was rendered defective from the incapacity

of a stranger. To remedy this singular mischief, various acts were successively passed, which have recently been consolidated into one, namely, 6 Geo. IV. c. 74, whereby infant trustees and mortgagees, and persons acting on behalf of insane trustees and mortgagees, or of trustees out of the jurisdiction, or whose existence is uncertain, are authorized to convey, under the direction of the court of chancery, or, in specified cases, of other equitable jurisdictions. While the present system prevails, the provisions of this act are indispensable; but the delay and expense of its proceedings must be too obvious; as must also be their needlessness, when it is reflected, that the estate ought to cease with the trustee, and pass over with the trust, as a shadow with its substance.

Nor is this all—Land, vested in a trustee, being deemed his own *at law*, will, consequently, pass there by his will, containing a general devise of all his estate. But this may be so qualified as to the object of the disposition, as to pass such lands only as he is beneficially entitled to. As, when the gift is to one for life, with remainder to another, or charged with debts or legacies; since these interests cannot be raised in the estate of another. Other instances occasionally occur, as may be supposed, of a more doubtful character; as, where the devisee is also executor, with a general direction for payment of debts; and then, it is said, there is no inconsistency between the devise and the

trusts, as the debts were meant to be paid by the devisee out of the personal estate, of which he is the executor. This for a single specimen ; but, on contracts for sale, many a title has been ruinously hung up in chancery, on a question in reality foreign to itself, and regarding only the will of a stranger.

Similar difficulties, it may be noticed, as frequently occur on the death of a mortgagee in fee ; the legal estate in whose security descends to his heir or devisee ; but clothed with an implied trust, first for his executor or administrator, and then for the mortgagor ; while the money, the substantial part, devolves to the executor. The act already quoted provides for the inconvenience in this case also ; but upon the same vicious principle, of regarding the legal estate as something distinct from the lien.

Should the trust be of a term, then it must be assigned by the personal representative of the deceased trustee. It sometimes happens, that he dies insolvent, and no one proves his will or administers to him. It more frequently occurs, (and, should the term be of any antiquity, must invariably be the case,) that the personal representatives of the trustee are all dead, and his assets distributed ; and then there is no occasion to administer further to his effects. In each of these cases, the useless charge of suing out a *limited*

administration, (as it is called,) that is, so far only as respects the term, thus technically continued from the deceased, is cast upon the beneficial owner, in order to acquire a legal interest in his own property.

TITLE II.

OF THE CONSEQUENT DIVISIONS OF REAL
PROPERTY.

WE are now ripe to proceed with the artificial characters given to real property, chiefly by the foregoing clauses—And first, with regard to the land itself.

Land, by our system of tenures, is principally divided into freehold at common law, customary freehold or free copyhold, ancient demesne, gavelkind, borough English, and copyhold.

Freehold at common law, (or free and common socage, as it is technically termed,) is the general tenure; and, after a few brief notices of the peculiar qualities of all the remaining tenures, except copyhold, it is proposed, for the purposes of the first part of this essay, to consider all lands as simple freehold. Copyhold, as it forms a total and extensive anomaly, will hereafter be made a subject of distinct consideration. With respect to the remaining freeholds, their chief peculiarities are as follow:—

Customary freeholds, or free copyholds, are not alienable by deed, but only by copy of court roll of the manor of which they are holden. They are sometimes called free copyholds; but they differ

from copyholds, chiefly, in the grant of the former being to hold *according to the custom of the manor* ; while the grant of the latter is, to hold *at the will of the lord*, according to the custom of the manor. But, as the copyholder himself is no longer actually subject to the will of the lord, this distinction is merely technical. The most substantial differences between them are, that the customary freeholder is not subject, like most copyholders, to an arbitrary fine on death, and alienation ; and that the presumption as to the right to timber and mines is in his favour ; but he is equally incompetent with the copyholder to vote for the election of a knight of the shire.

Ancient demesne is another species of customary freehold.—It consists of lands formerly part of the ancient demesnes of the crown, granted out to hold under certain rustic services, to be performed within the royal manors to which they belonged. These manors gradually came into the hands of subjects, but their character of ancient demesne still subsisted. The practical peculiarities of the tenure are,—that the tenants may not be impannelled on juries, nor impleaded for their lands in any court but that of the manor. The latter, however, instead of being a privilege, often proves a serious inconvenience ; for the assurances by fine and recovery, hereafter noticed, being fictitious legal processes, are often inadvertently passed in the Court of Common Pleas at Westminster, and are then

liable to be reversed by a writ of *deceit* at the lord's suit, as ousting him of his seigniority; and titles are thus unexpectedly brought into question. Another inconvenience is, that fines levied in the lord's court, are wanting in the most essential properties, given by statute, of barring entails; and admitting proclamations to be made in open court upon them, which work a general bar at the end of five years after their completion.

Gavelkind is the general tenure of the county of Kent; and subsists occasionally elsewhere. It varies essentially from ordinary freehold in the mode of descent; which, in the latter is, among males of equal degree, according to the established rules of primogeniture; but in gavelkind is, among *all* the males, whether sons or brothers, equally; but with right of representation to the issue of any of them dying before the ancestor. It has other peculiarities, as to the legal incidents of curtesy and dower, to a husband and wife surviving, which need not be specified. There is, however, one singularity deserving of notice, namely, that it does not escheat to the lord for felony. This, doubtless, is owing to the Kentish men having asserted and preserved their own customs at the conquest; when feudality, and its incidents of tenure, were unknown here.

Borough English also essentially varies from common freehold in the mode of descent, which, in this peculiar tenure, is to the youngest son, instead

of the eldest; but the custom does not ordinarily extend to collaterals.

The five foregoing customary tenures may be dismissed with the observation that, to annul them, and to impart to the lands affected by them the simplicity of the general rules of alienation and descent, would be to confer a great benefit on the owners, without injury to the rights of others. The rights of seigniority are of no value; and, after the great sacrifices made by the abolition of tenures at the restoration, will scarcely bear mention. The only sensation to be imagined, is in Kent; but the sentiments of that county, and particularly of the greater landowners in it, may be fairly inferred from the various disgavelling acts which, from time to time, have been passed.

Next, with regard to the *artificial* burdens, or servitudes on land,—

The *essential* burdens on real property; namely, rights of light, way, water, and perhaps rent-charges for limited periods, have already been noticed. Those of an artificial character spring chiefly from feudality; as the royal privilege of the chase; whence forests, with their various privileges; which, passing into the hands of subjects, were degraded into *chases*; free warrens; the numerous fruits of tenure, as fines on death and alienation, heriots, profits of courts, &c.; common of pasture, being a

privilege to the tenants of depasturing over their lords' waste. Of the foregoing, the venatory part may be dismissed with bare notice. The profits of tenure will be discussed under the head of copyholds, to which they are now principally confined. As to rights of pasture, the opinion, both of the legislature and the public, upon the policy of this privilege, has been already expressed by the general Inclosure Act of 41 Geo. III. and the numerous local inclosure acts which have passed and been acted upon, both before and since; to such an extent, indeed, as to have materially diminished the general quantity of waste land.

A servitude, however, of a distinct character, which in singularity, in complication, in productiveness of litigation, and in pressure on the soil, surpasses any one of the foregoing charges on land, exists, almost unmitigated, under our laws, in the shape of tithes. Why I feel compelled to dismiss so important a branch of my subject with a bare notice, will appear hereafter.

TITLE III.

OF THE MODIFICATIONS OF INTERESTS IN REAL PROPERTY.

LAND may be holden either in perpetuity (which is technically called a fee-simple), or for a limited period ; as, during the continuance of a line of issue, or for life, or years. It may be granted either in possession, or upon a future event ; as, after the death of the first taker ; and that either certain or contingent. The absolute interest, and consequently the power of alienation, may be postponed for limited periods, during which time it remains in settlement, as it is termed. It may be charged, or pledged for the payment of a sum of money, either annual or capital, or for performance of any specific act.

CHAP. I.—*Of a Fee-Simple, or absolute Ownership.*

1. *An estate in fee-simple* forms the largest interest in real property. To create it, words of inheritance are necessary : that is, the gift must be to the grantee *and his heirs*, unless in cases of wills, where tantamount expressions are admitted, as will be shown hereafter. This requisite is not essentially

inherent to the nature of real property ; but it arose out of the progress of the feudal system, the first grants under which were for the life only of the feudatory, in return for his military services. Thence grants were gradually extended to his heirs ; but for this purpose it was necessary to name them. The rule has long survived its object ; and, as it is not grounded on the ordinary reasoning of mankind, with whom, to dispose of a house or a field imports, as in the instance of a jewel or a horse, the disposition of all the donor's interest in it, his neglect of this technicality frequently defeats his intention.

The following are the leading features of a fee-simple estate :—It is disposable by the owner, either during his life or by will, and that either absolutely, or for any partial interest, under certain limits as to the period during which it may be rendered inalienable. In default of any disposition, it descends to the heir, charged with certain eventual life-interests, in favour of a husband or a wife surviving, which will be noticed in their proper places. It is liable to the owner's debts of a particular description ; and, under certain circumstances, is disposable for their payment. It is forfeitable to the state for treason ; and, finally, under the system of tenure, it escheats or reverts to the lord of the fee for default of heirs, including corruption of blood, by attainder for felony, as one of the causes of such defect.

CHAP. II.—*Of Estates Tail, and other Modes of Settlement.*

2. It has been already stated, that feudal grants were originally for life, but that they were gradually expanded to a fee ; but this estate might pass to strangers, and it was desirable to secure it in the blood of the feudatory. The inflexible character of tenures did not admit of such a modification of interest. It was effected, therefore, by the indirect means of a gift to the feoffee, on condition that he had heirs of his body. But, by having heirs the condition was fulfilled, and the feoffee was rendered the absolute owner, with the consequent power of alienation. To prevent this, was passed the statute *De donis conditionalibus*, 13 Edw. I., frequently called the statute of Great Men, whereby the land was secured inalienably to the lineal heirs, either general or male, of the donee, as long as they endured ; but it never passed beyond them to the collateral heirs. The interest thus created was called *an estate tail*, being a *curtailed* inheritance.

Gradually, however, and by means of legal fictions, prompted by the growing spirit of commerce, and other political circumstances, these estates have become extendible into a fee-simple, and capable of alienation, in particular cases and modes. These, or the principal of them, are as follow :—Where the tenant in tail has also the im-

mediate fee in expectancy, he may acquire the absolute ownership by the fictitious process of a *fine*, whether his estate tail be immediate, or expectant on a preceding life, or other partial estate. Where, however, on failure of the lineal heirs in the entail, the property stands limited over to another, there the tenant in tail, to acquire the absolute fee, must resort to another and more intricate judicial fiction, called a *common recovery*; but this is practicable only where either he is himself entitled to the possession, or can obtain the concurrence of the immediate possessor, having an estate of freehold at least; that is, for life, either for his own benefit, or as a trustee for another; as in the ordinary instance of a son tenant in tail, expectant upon the death of his father, who has the preceding life-estate, either in himself or his trustee. These processes of fines and recoveries, are feigned actions for the recovery of the land; and, in legal supposition, they can only take place during term. By another fiction, however, (which it would be needless to state here,) fines may be passed in vacation, by relation to a preceding term; but recoveries must still be perfected *in term*. This, and the necessity for an estate in possession, in order to suffer a recovery, constitute the essential difference between the operation of these two dramatic assurances.

Estates tail, with the powers of defeating them by fine and recovery, constitute, at this day, the

principal mode of *Settlement of lands*. Its extent, and the consequent restriction upon alienation, next present themselves for consideration. An estate tail, it should be premised, is never given to the first taker, ordinarily the parent, as he might instantly bar it; but *he* is made tenant for life, with remainder, (passing here the technicality already noticed in tit. i. ch. l. of trustees to preserve contingent remainders,) to his first and other sons successively, according to their seniority in tail; with (usually) remainder to the daughters equally in tail; and often with dispositions over to collaterals of the family. By this means the estate is rendered inalienable for the first generation, unless the son arrives of age, and concurs with the father in suffering a recovery; in which case they may together acquire the absolute ownership. Should this not take place, the estate remains tied up to the father's death; when the issue in tail, whether a son or daughters, may acquire it by similar means. In by far the majority of instances, the fee is acquired by the issue of the first taker, either in concurrence with him, or after his death; though, from deaths during infancy, want of issue, or other causes, the estate occasionally passes over to the grandchildren, or the collaterals, if in the entail. Balancing against each other the two extreme classes of events, the earliest, that of the father and son concurring in a recovery, the latest, that of the remainders to collaterals taking effect, it may be safely asserted, as

a medium, that, under settlements by means of entail, estates are ordinarily tied up for one generation.

Another, and more modern mode of settlement, next demands our notice. It is effected by what are called *springing uses* in deeds, and *executory devises* in wills. The rigid law of tenures allowed of no limitations after a fee ; but uses, adapted as they were to the exigencies of more recent times, and devises, which followed them in their modifications, admitted of this fee being rendered defeasible on certain events, and another being substituted for it. After much uncertainty as to the extent to which these substitutionary estates might be carried, they were finally limited to the period of a life or lives in being, and twenty-one years afterwards ; with a further allowance for the gestation of *conceived* issue (about ten months). This limit was fixed by an alleged analogy to settlements by entail, on the parent for life, with remainder to his unborn eldest son in tail, and with any extent of remainders over, for life and in tail ; but all of which might be barred by the son, either alone, or concurrently with the parents, if living, suffering a recovery on attaining his majority, to which period the above limitation of twenty-one years was meant to relate.

An essential variance was, however, in time discovered between the two modes ; inasmuch as, in springing uses and executory devises, the lives

were not required to take correspondent interests, or to be otherwise connected with the estate, but might be introduced as mere nominees, for the purpose of protracting the power of alienation. This defect was taken advantage of to an extraordinary extent by the late Mr. Thellusson, who, in his will, directed the produce of his estates, both real and personal, to the amount of about 800,000*l.* to be accumulated and laid out in land, during (in effect) the lives of all his descendants, however numerous and remote, who should be living at his death. At the end of that period the estates, as well devised as directed to be purchased, were to be divided in lots between the eldest male lineal descendants, then living, of his three sons. The trust, after having been contested in Chancery, and on appeal in the Lords^(a), was finally established, and is in operation while I write; but it occasioned an act restrictive of accumulation, which will be noticed hereafter.

The rule, however, is still in full force as to capital. In its defence, it is often urged, that all the candles are burning at the same time. Luminous as may be the illustration, it is somewhat defective in exactness: the candles are of equal length—but among a number of lives selected, a few will probably occur who far outlive the ordinary period of mortality. So calculate the life-insurance

(a) 4 Ves. 227.—11 ib. 112.

companies ; and so did the testator, or his legal adviser, in a cause of *Bengough v. Edridge*, which now awaits the judgment of the Vice Chancellor, in the following singular will, which I shall cite somewhat at length, as strongly illustrative of the extent of perversion to which the defective terms of the rule in question exposes it. The object of an opulent testator, who had no issue, was to give his large landed estates, and those which might be purchased with their produce during twenty-one years (the period still allowed by law for accumulation), to his collateral relations, consisting of five nephews and grandnephews, a niece, and a grand-niece, and their several male descendants, for successive life-interests, as far as the restrictions of the law against perpetuities would allow. For this purpose, all such estates were vested, and directed to be vested, in fee-simple, in trustees, who were to hold the same for a period of 120 years from the testator's death, if twenty-eight persons therein named (of whom the first seven were the above relations, and the other twenty-one strangers), or any of them, shall so long live ; and then for a further period of twenty years, from the determination of the first term. These terms were intended as nearly commensurate with the periods during which estates might be tied up ; viz. any lives in being and twenty-one years ; and might be termed the machinery of the contrivance. Then followed its working, or the beneficial interests carved out of

the terms. They consisted in a series of trusts for a term of ninety-nine years, if each successive donee should so long live, for the nephews, great nephews, niece, and grandniece named, and the respective heirs male of their bodies in succession, forming, in effect, successive estates for life; and finally, failing the whole of these, for the individuals successively answering the description of the testator's right heirs, during similar derivative and determinable terms of ninety-nine years each; until the above technical terms of 120 years and twenty years should be exhausted, either by lapse of time, or the deaths of all the nominees. As to the reversion expectant on the above two terms of 120 years, and 20 years, testator directs it to be conveyed on the determination of these two terms, and not before, to his nephews and great nephews, niece and greatniece before specified, and their respective issue male, in the like order of succession in a course of strict settlement; and failing all these, to his own right heirs; but he subjoins a direction, that none of them shall take a vested estate till the end of the terms.

It will naturally be asked, If the law allows, as you state, alienation to be restricted for any life or lives in being, and twenty-one years afterwards, why not do it directly, and dispense with this cumbrous machinery? The answer is, that, after a gift of freehold to an unborn person for life, no interest can be limited less than an estate of inherit-

ance, and consequently alienable. Had the eldest son, therefore, of the first nephew been made tenant for life, the dispositions over would have been all void. Terms of years, however, being created to nearly the utmost extent for which the restriction is allowed, it was conceived that derivative terms might be lawfully carved thereout for successive portions of the same periods. Without criticising its parts, the device is an ingenious perversion of the purposes for which these restrictions were established. Its success will depend upon the result of a struggle between the lax terms of the rule, and its real object.

In fixing the rule, what a difference it would have made, if, in lieu of "*for a life or lives in being,*" its framers had said, "*to a life,*" &c. ; and if, instead of permitting an *absolute* term as a provision against the *eventual* period of minority, the infancy itself had been made the term of procrastination(a) ! Such is ever the advantage of direct over allusive institution.

The act before alluded to as restrictive of accumulation, is 40 Geo. III. c. 98, which prohibits all accumulations of profits, both of real and personal estate, and either by deed or will, unless—1. For

(a) It should, however, be noticed that there are not wanting high authorities for contending, that the superadded period of twenty-one years, is prescribed only as referrible to the infancy of a donee, and not as an absolute term of extension.—See 4 Ves. 337.—1 Turn. 25, and references.

the life of the grantor ; *or*, 2. For twenty-one years from the death of the grantor or testator ; *or*, 3. During the minority of any person or persons living or *conceived* at the death of the grantor or testator ; *or*, 4. Who, if of full age, would be entitled, under the limitations, to the profits : but with an exception of provisions for payment of debts ; or for raising portions for any children of the settlor, or of any persons taking an interest under the settlement ; and of directions touching the produce of timber.

These restrictions are, in general, good, inasmuch as they confine accumulation either to fixed periods, or to persons connected with the estate. They occasion, however, one law for the capital, and another for the profits ; and have already introduced several distinctions as to the latter ; producing thus,—as is ever the case, when partial correction is attempted, the greater evil, of swelling the mass of law.

The exception of provisions for payment of debts is of more doubtful policy. It affords, when the debts are large, an opportunity of evading the spirit of the act, by directing an accumulation through a long series of years ; and it may produce the still greater evil of enabling a testator to delay his creditors for an unreasonable period. In this view it seems to sanction an opinion, questioned by some, that *any* provision for payment of debts takes the case out of the statute of fraudulent

devises. Surely if an efficient remedy is ever necessary, it is for the prompt discharge of debts.

CHAP. III.—Of *Estates for life*.

These form the next description of partial interests. Simple in their nature, and already somewhat anticipated, in describing the preceding interests, they require but little additional explanation. A tenant for life holds, either for his own life, or for the life or lives of another or others. The first interest (being what the civilians call an *usufruct*) is the more frequent. It originates either from our legal institutions, as tenancy in curtesy and in dower; or under our ecclesiastical establishments, as rectories, and other church preferments; or from actual dispositions by grant, settlement, or will. Estates for the lives of others are usually granted, either under statutory powers of leasing, in corporations, for instance, the crown and ecclesiastical bodies; or in particular districts, chiefly in the west of England, where this mode of farming out lands more or less prevails; or in copyhold estates, by the special custom of some manors.

Estates for the lives of others, or *pur autre vie*, (as they are called,) have some peculiarities; but which here need only be briefly stated. If limited

to the grantor *and his heirs*, they pass to the heir, in case of intestacy, as the person designated. If to one *and his executors and administrators*, they become in effect, under certain statutory provisions, personal estates. They are capable of being limited by settlement to the issue of the marriage, as fee-simple property is ; but with this difference, that the *quasi* estate tail, as it is called, in leasehold *pur autre vie*, may be barred by the simple deed of the person entitled.

CHAP. IV.—*Of Leases for Years.*

These form the next modification of real property. In granting them the original object was, the productive cultivation of such of their lands as the great proprietors could not themselves occupy, either with their domestic servants, or by means of their villains. For this purpose they were granted out for a definite term of years, at a certain rent. Being carved out of land, leases for years ought, from analogy, to have the same qualities as other real property. Our law has, however, viewed them as mere contracts between landlord and tenant, for the latter's occupation of the land, on specified terms ; and, as the tenant's property employed in it consists of his stock and crops, which are personal estate, leases for years are also considered as such, and class accordingly, as to

their transmissibility by deed or will, or in case of intestacy ; their liability to creditors, and other legal properties.

The ingenuity of the ecclesiastics to evade the laws against mortmain, and the inaptitude of the system of tenures to bend to the various wants of proprietors, particularly in the instance of mortgaging, occasioned the creation of fictitious leases for this and similar purposes, the terms in which were so long as to amount in effect to a perpetuity ; and the rents reserved (for the analogy was preserved throughout) were merely nominal, as a peppercorn, a rose, &c. The tenant's entry on the land was indeed necessary, to give effect to this supposed contract for its occupancy ; but even this requisite was dispensed with, when uses were legalized by the statute of 27 Hen. VIII., and in consequence of this law, long terms equivalent to the fee, might be created by mere writing, without any further solemnity ; as will hereafter be shewn, in speaking of assurances operating by way of use.

CHAP. V.—Of *Estates in possession and expectancy.*

The several foregoing interests may be created either *in possession*, or *in expectancy* ; and, in the latter case, to take effect either absolutely, as in a gift to an existing son, after the death of a parent ; or else eventually, as to an existing son, if he survives

his parent—or to an unborn son—or after an intended marriage. These are all natural characters ; but there are others, merely technical, which have been already shortly noticed ; as, *contingent remainders*, when the disposition forms a consecutive portion of the original fee ; springing uses, and *executory devises*, when they do not immediately succeed, or, (as it is technically termed) *depend upon* a preceding partial estate, but form unconnected dispositions, to take effect, either at a future period, the intermediate interest being undisposed of, or else after a prior defeasible limitation of the fee.

CHAP. VI.—*Of Mortgages and other Charges.*

Real property has also been ever *chargeable*, both by the common law, and by way of use, with rents or yearly sums ; and partly under these systems, and partly by special statutory provisions, with a power of distress and sale for enforcing them. With respect, however, to *capital* monies, as loans, portions for children, &c.—by the system of tenures, lands were granted, not in absolute property, but in return for services, either military or of the plough. These dispositions did not allow of any effectual mode of charging the lands for the benefit of strangers, and at the same time leaving them, subject to the charge, in the hands of the tenant. Such charges were consequently effected

by the circuitous mode of granting the estate itself to the mortgagee; or to a trustee for raising the portions, *under a condition* to be void on payment of the money.

The requisite publicity of feudal tenures had, however, established, that an estate of freehold could not cease, on performance of a condition, without either entry or claim. When such a condition too was forfeited, the wife of a mortgagee was, in strictness, entitled to her dower. For these and similar reasons, the grants of long terms, which did not require the solemnity of entry for defeating them, on performance of the condition, and did not carry any of the incidents of absolute ownership, when forfeited, were found more suitable, and were more generally adopted for effecting a mortgage, than conveyances of the fee. These, however, have, in their turn, been recently much revived; from the advantage they carry of the absolute interest being rendered saleable by the mortgagee at his pleasure, in default of payment; a power of rather modern introduction, and the validity of which, in its full extent, is as but of yesterday. Equity too has interfered, to prevent the widow of a deceased mortgagee in fee from claiming her dower.

Each of the two modes of mortgaging has its advantages and inconveniences. The power of sale gives a mortgagee in fee the complete disposition of the estate; but on his death, the security

and the money pass to different classes of representatives; the former to the heir, who may be an infant, or a lunatic, or a married woman, none of whom can convey the security, without expense and delay, as has been already shown; or it may become a question, (to be settled at the mortgagor's cost,) whether it has not passed, by some general disposition, in the mortgagor's will, of his own landed property; it being considered *his* at law. On the other hand, in a mortgage for a term of years, the security and the money pass to the same class of representatives; but the interest is not saleable to advantage.

The first principles of property would assign effect to every security, according to its priority of date: from that moment the land, to the extent of the charge, is no longer in the mortgagor's power, but belongs to the incumbrancer; and such is actually the case, where the charges are all of one character, either legal or equitable. The artificial distinction, however, between these two species of interests, has introduced a correspondent one into mortgages, under the term of tacking; which is often subversive of the above just rule. That a first mortgagee, holding the title-deeds, not having notice of a second mortgage, may make a further advance on the credit of his original security, is incontestable. It was incumbent on the second mortgagee, when the deeds were not forthcoming, to seek out their possessor, and give him notice.

That rule, however, is of a far different character, by which, an estate being mortgaged to two in succession, the second mortgagee, if he had no notice of the prior charge when he advanced his money, may, by getting an assignment, or declaration of trust, of any outstanding judgment, term of years, or other legal interest anterior to the first mortgagee, tack his subsequent incumbrance to this anterior interest, and thus take precedence of the first mortgage. Nor does it vary the case, if the subsequent incumbrancer, after having advanced his money, has notice of the first mortgage, when he gets in the prior legal estate; or even if it be done, *pendente lite*, in an equity suit, so it be before the decree. This privilege of tacking is, however, confined to a mortgagee, and not allowed to a judgment creditor; on the ground that the latter, though he acquires a lien on the land by his judgment, does not advance his money on the immediate credit of the debtor's real estate; since he has other remedies; viz. the goods and the body. The reverse case, however, of a first mortgagee lending a further sum on judgment, and thereby excluding an intermediate mortgage, of which he has not notice, is admitted, on the rather refined presumption, that he made the further advance as knowing he had a hold of the land by the mortgage; and the judgment, though it passed no present interest in the land, yet formed a lien upon it.

In one instance, first and third securities have

been allowed to be tacked, to the exclusion of an intermediate one, in violation of a principle established by courts of equity themselves; namely, that the incumbrancer, getting in a prior charge, must, in order to exclude the second mortgagee, have made his further advance on the security of the property charged. The instance alluded to is, where two estates being subject to a prior incumbrance, the owner mortgaged both of them to A., and then mortgaged only one of them to B. The last incumbrancer, on getting in the precedent charge, was allowed to hold both estates against the former mortgage, although he advanced his money on the credit of one estate only, without having contemplated the other estate, not even to the extent of acquiring a general lien by a judgment! (a)

With respect to the capacity of outstanding terms of years, to protect subsequent mortgages, without notice, against prior incumbrances, it makes no difference whether they are what are called terms in gross, or subsisting for some unsatisfied purpose—as to raise a sum of money; or have been assigned, upon an express trust to attend the inheritance. In either case, if the term be assigned, or its possessor execute an express declaration of trust of it for the mortgagee, it will protect the latter, as covering the entire legal estate for the period, to

(a) 1 Eq. Ca. Abr. 323.

the whole extent of his first advance ; though, in the instance of a term in gross, it should, by just reasoning, avail only to the extent of the actual charge under it ; that being the substance to which the legal term is the shadow. In the case of an attendant term, it should, if allowed any operation whatever, protect both the first and the second mortgagee, each in their original order, their charges being alike carved out of that inheritance on which the term is attendant.

Absence of notice, on the part of the *paisné* incumbrancer, being a necessary ingredient in the rules of tacking, as between successive incumbrancers, all the equitable doctrine of notice, both direct and constructive, is necessarily let in. The distinctions on this subject form no inconsiderable body of equity in themselves ; and, as they apply equally to purchasers and other classes of proprietors, and peculiarly affect our laws of registration, they will be found under Title VIII., *infra*, which unites these two subjects. In all cases, however, of a subsequent mortgagee superseding a prior incumbrancer, there is the radical blame of negligence, in not seeking and giving notice to the holder of the title-deeds. This imputation does not affect a first mortgagee, who, possessing them, makes a further advance without notice.

The distinctions of tacking have been also applied, in equity, to cases between the mortgagee on the one hand, and the mortgagor, or his repre-

sentatives, and their alienees, on the other ; in which the question of notice can have no application, though to the sacrifice, in some instances, of a principle to a mere convenience. Thus, a mortgagee, being also a creditor by bond, cannot tack the bond to his security, as against the mortgagor ; but he is allowed to do so as against his heir or devisee ; because, it is said, upon the ancestor's death, the bond becomes the proper debt of the heir ; and, by statute, of the devisee. But this is only to the extent of real assets descended ; and what, then, becomes of the equitable principle—that all debts in equal degree, as bonds are, ought to be paid *pari passu* ? The above privilege, however, by a further distinction, extends against the heir and devisee only of the mortgagor, and not against a purchaser from them ; since nothing charges land in the hands of an alienee, except what forms a direct lien. Both the original rule and its exceptions are held equally applicable to cases of mortgages for terms of years.

Various other distinctions subsist in courts of equity, where mortgages are principally cognisable, respecting these securities ; some of them forming abstract and just rules on the subject ; others originating either in our artificial system of real property, or in the frequent efforts of equity to administer justice in each individual case, though at the sacrifice of principle ; and then, one exception generates another. The present object, however,

being, to take a general view of those parts of our laws of real property, which most call for correction, enough perhaps, for this purpose, on the subject of mortgages, is to be found in this chapter and the one referred to.

CHAP. VII.—*Of Joint-Proprietors.*

The preceding qualities of real property all presume a sole owner. It occasionally, however, belongs to more proprietors than one; and their technical distinctions are:—*Coparcenors*—*Tenants in common*—and *Jointenants*. The first of these take by legal succession, forming a class of heirs who, either as females, or deriving from females, divide the estate between them by rules, a summary of which will hereafter be given in speaking of succession. Their respective shares are alienable to the fullest extent; and, in default of alienation, they descend, on death, each to the heir of the individual dying seised. The other two classes derive their interests under actual grants, by deed or will. The shares of tenants in common are alienable; and are, to a general intent, descendible, in the same manner as those of coparcenors. Jointenants, however, have some peculiarities. Each jointenant may aliene his share by *deed*, but not by *will*. In default of such disposition, it accrues, not to his own heir, but to the surviving jointenants; and so on to the last survivor. This species of property

originated in the principles of tenure, which discouraged the splitting of fiefs, as producing an inability to perform the lord's services. In other than feudal systems of jurisprudence it is, I believe, unknown; and, from the decay of tenures, and its repugnancy to natural justice, as placing property on a chance, and depriving the creditors and the families of the owners first dying of their just claims, it is now less favoured than formerly. Indeed, in cases of joint-purchasers and mortgagees, each advancing his distinct share of the money, equity interferes, with some exceptions, to prevent its legal effect.

Exclusive of voluntary partition by any of the preceding classes of co-proprietors, a compulsory partition may be effected between them by writ; partly at common law, and partly by statute, during their respective estates, whether of inheritance or partial. The legal remedy, however, even after it was aided by the modern statute of 8 and 9 William III. c. 31, being found tedious and expensive, incumbered as it is with the useless solemnity of a jury, and confined in its operation to the actual estates, whether in fee, or only for life, of the tenants in possession, the court of Chancery has gradually acquired the principal cognisance of partitions, which it extends to the fee; the proceedings in it for that purpose being by a commission to certain persons named, who proceed to a division of the estate without a jury, and make their

return to the court, which is confirmed by a decree, if not objected to by any of the parties. This decree, however, like other proceedings in equity, binds only the person, and not the estate, which must afterwards be conveyed pursuant to it; a circumstance that, if any of the persons interested are infants, or not in existence, renders the partition incomplete at law, until they can convey. A more effectual, as well as more summary remedy, is given, in the instance of allotments under inclosure acts, by the general Inclosure Act of 41 Geo. III. c. 109, s. 16, which empowers the commissioners under any local act, upon the request of any joint-tenants, coparcenors, or tenants in common, to make partition of the allotments effected by it, notwithstanding any legal incapacity in the parties interested; and to allot the same accordingly. Their adjudication directly binds the land, without any further act.

TITLE IV.

OF THE DIFFERENT MODES OF ACQUIRING REAL
PROPERTY.

REAL property is acquired—1. By descent. 2. To a partial extent, by the rights of marriage. 3. By disposition by deed or will. 4. Under the rights of creditors. 5. By escheat or lapse to the lord of the fee, upon either a total failure of inheritable blood, or corruption of it by attainder for felony. 6. By forfeiture to the crown by attainder for treason. And 7, By adverse possession, usually called limitation of time.

Of these, each in its order.

CHAP. I.—*Of Descent.*

From the general inaptitude of feudal tenures to the faculty of alienation, especially by will, *descent* was formerly a much more frequent mode of transmission than at present.

Land is descendible, first to the lineal heir; and, failing that, to the collateral, after the following rules:—*First*, among kindred of equal degree, whether lineal or collateral, the males are preferred, and they take in succession, according to

established rules of primogeniture. Failing them, females in the same degree take collectively, in equal shares. *Secondly*, the right of representation takes place, where one of several persons in equal degree dies before the ancestor, leaving issue; so that the son of a deceased elder son—or brother takes in preference to a younger son or brother; and the issue of a deceased daughter or sister takes an equal share with the surviving daughters or sisters. *Thirdly*, if the ancestor was entitled by *descent*, or as heir, either in the paternal or the maternal line, the land passes in that line only; and never, in failure of it, to the other. If, however, he was entitled by *purchase* (which here means not merely by contract for money, but also by settlement, gift, or will; or, in short, any mode except descent), then it passes, first, to the paternal line; and, failing that, to the maternal line. *Fourthly*, the collateral heir must be of the whole blood of the ancestor dying seised. For instance, an uterine brother, or any descendant from him, can never succeed; but the land shall rather pass to the most remote relation; first on the father's side; and, failing that lineage, on the mother's side; and, failing both, shall escheat to the lord. *Fifthly*, lineal ancestors, whether parents or others, although they may be the medium of transmission to others, cannot themselves succeed; or, as it is phrased, land can never *ascend*, but shall sooner escheat.

The two last rules are repugnant to every principle of property, and to the moral feelings of kindred; but these, as well as many others, originated in circumstances of tenure, which treated land, not as property, but as the condition and compensation of service—first of the sword, but afterwards extended to the plough.

CHAP. II.—Of the Rights of Marriage.

The husband is ordinarily entitled to the possession and profits of his wife's freehold property, whether it be legal or equitable, during their intermarriage. By means, however, of the modern use of powers, her lands, or the profits of them, may be placed at her own exclusive disposal and enjoyment, free from the control of her husband or his creditors. This anomalous species of ownership will be further explained, in speaking of persons competent to aliene.

Should the wife die seised of either fee-simple or entailed property, in the husband's life-time, having had issue by him capable of inheriting the property, then, *but not otherwise*, he is entitled to it for his life, which interest is called *Tenancy by the curtesy*. The consequence is, that the surviving husband, during his life, deprives the wife's child, who possesses her nearest affections and claims, of that

property which he relinquishes, untouched, to a collateral, perhaps a remote relation, for whom her regard must be comparatively feeble.

Should the wife survive the husband, she then, whether having had issue by him or not, becomes entitled to *dower*; which consists in her right to enjoy, during her life, a third part of whatever lands he was seised of, either in fee-simple or in fee-tail, during any period of the intermarriage,

The foregoing rights being created by common law, are attached of course upon all legal estates. Equity professes to follow the law, and it does so in allowing the husband similar privileges out of his wife's estates, although vested in trustees' names, if not limited to her separate benefit or disposition. In dower, however, it has inconsistently rejected the widow's claim on the trust-estates of her deceased husband, on the ground, that the seisin was not in him, but in the trustee. Husbands naturally availed themselves of this technicality to protect their inheritances against dower by various devices, the nature and embarrassing effects of which will be best described when speaking of conveyances framed with this object.

CHAP. III.—*Of Alienation by Act of the Party.*

By our present law, land, with every interest in it, is alienable either by deed, or act *inter vivos*, or

by will, with some qualifications. These regard either the persons disposing, or the property to be disposed of. I shall first consider each in its order, and then state some of the leading characters of deeds and wills.

Sect. 1.—*Of Persons competent to aliene.*

For the purposes of the present outline, it may be propounded, that all who are competent to hold land, and have attained the age of twenty-one years, may aliene it; except persons disabled by mental incapacity, or from crime; or, to a limited extent, married women. The two former classes may here be passed over. The disabilities of wives are not reducible to any system; but, to be understood, require to be particularized. According to the common law, wives cannot convey by deed, nor make a will; but, with the concurrence of their husbands, they may aliene by fine; or, where necessary in respect of some entail, with remainder over, by common recovery. Each of these assurances requires a secret examination of the wife, either by a judge of the Common Pleas in town, or by commissioners in the country; to prevent undue coercion on the part of the husband. So far considerate; and equity has acquiesced, as to trust-estates, in this rule of law. Two new species of property, however, have been invented in modern times, in favour of wives; the one both at law and

in equity, and the other in equity exclusively. The former takes its effect through the medium of powers, created either by limitations of use, or by trusts, or by wills applied to either of these systems. It allows of land being rendered alienable, through what is technically called a power of appointment, by a wife, with the same freedom as if sole. In equity, in addition to such powers, property may be vested in trustees, for her sole use and enjoyment, uncontrollable by her husband or his creditors.

Thus, under the three systems of tenures, uses, and trusts, a wife has three different and graduated interests in her real property. At common law she has merely the name ; while the husband, who is seised in her right, has the ownership, during their intermarriage ; the right of alienation being still vested in them jointly, but after a particular form and caution. By means of uses, she may have the exclusive power of disposition ; while the enjoyment, in the interim, remains with the husband. By means of trusts, and of testamentary dispositions, applied either to uses or trusts, she may acquire both the absolute enjoyment and the right of disposition. Whether all, or only a part, of these rights should subsist, is a question for legislative decision ; but surely it is, at all events, fit, that three discordant systems, the first obsolete in principle, and the other two acting unequally and by indirect means, should give way to one uniform, intelligible class of rights.

Sect. 2. *Of Property susceptible of Alienation.*

Every description of absolute property, whether in possession or expectancy, may be disposed of either by deed or will; and in specific parts, or by a general disposition. An estate tail can only be disposed of by one of the two modes of fine and recovery; as applicable to the different circumstances already noticed; in speaking of this qualified interest. The owner of a contingent or eventual interest cannot dispose of it *at law* by deed; the maxim being, that nothing is disposable but what, in a technical sense, is *vested*. He may, however, bind himself and his heirs (which is called an *estoppel*); but not third persons. He may also devise it by will, as this derives its effect from statute, the words of which in this respect are ample. In equity too he may dispose of it by deed, if for a valuable consideration. It may also be the subject of a contract; which is solely cognizable in equity. Indeed these two resolve themselves, to a general intent, into the same species of assurance there.

Sect. 3. *Of Alienation by Deed, or Act inter vivos.*

Assurances for this purpose are of no less than five distinct characters. *First*, those which derive their effect from common law; as a *feoffment* with livery

of seisin, to pass an estate in possession ; *an exchange*, which bespeaks its own object ; *a grant*, to pass an interest in remainder ; *a release*, to relinquish an interest or a claim to one already in possession ; *a surrender*, to transfer a partial interest, as, for life or years, to one who has the next estate in remainder, and by this means extinguish it. *Secondly*, those which rest upon ancient fictions of law ; as a fine, and a common recovery, which are feigned actions, whose different characters have been already noticed in speaking of the means of defeating entails. These, as they have no feature of a conveyance in themselves, require it to be conferred by a declaration of the use ; which is usually contained in the same instrument as the agreement to pass them. *Thirdly*, those which derive their whole effect from the statute of uses, as *a covenant to stand seised to uses*, which operates only in consideration of blood or marriage ; and *a bargain and sale inrolled*, whereby the bargainor, for some pecuniary consideration, real or fictitious, bargains and sells the land, and becomes thereby a trustee for, or *seised* to the use of, the bargainee. This use the statute legalizes, and thereby transfers the seisin to the bargainee. As this was a private transaction, however, another statute of the same year required bargains and sales of freehold to be inrolled within six months, with a view to publicity. It did not, however, extend to bargains and sales

for years ; the bargainee, in that case, being technically said to be *possessed* for the time. A *fourth* description of assurance is one which derives its effect from a mixed operation of the doctrines of uses and common law, namely, *lease and release*. This, as it is now the most common mode of conveyance, and yet one of the most complicated in its operation, and best illustrates the excess of technicality which pervades our daily transactions in land, requires to be briefly explained.

It is thus conceived—A lease at common law requires entry by the lessee to complete its validity. But a term of years may be also created without entry, by a bargain and sale, for a pecuniary consideration, which raises an use—this the statute legalizes, as already explained. The amount or truth of the consideration is not material. Five shillings is the ordinary sum. The statute of inrolments, it has been noticed, does not extend to terms for years. The alienor, therefore, for a nominal consideration of five shillings, bargains and sells the land for one year to the alienee ; who, being thus, by means of the statute of uses, fully invested with the possession, is capable, like any other possessor, of accepting a release, operating at common law, of the reversion and inheritance ; which is accordingly granted to him, by a deed executed immediately afterwards ; but dated the next day, in order to have the semblance of a future act.

The conveyance by lease and release possesses,

over a feoffment, the advantage of not requiring the formality of livery of seisin on the spot. It is doubly preferable to a bargain and sale, as not needing enrolment, (a process, in its present incomplete state, utterly useless as a registry,) and as admitting of legal uses being raised upon the seisin, which the release transfers at common law. But, whatever it may gain by comparison with other parts of a confused system, it certainly is not imbued, either in its conception, or in its operation, with the spirit of simplicity.

Assurances which pass existing equitable interests, (the legal estate being vested in the trustee,) form the *fifth* class. These have been already noticed generally. It may here suffice to add that, compared with the formalities, the fictions, and the circuities of *legal* assurances, they surprise us with a simplicity and directness of purpose which would satisfy the most zealous advocate for these desirable qualities; it being sufficient, that the transaction be in writing, without any set forms, or technical expressions. This and other similar instances evince that, to a considerable extent, our laws of property may be reformed merely by selecting, without innovating.

In legal dispositions *inter vivos*, however, of landed property, we should greatly err in conceiving that, when the mode of assurance is once determined, the substance may be executed with pre-

cision and simplicity ; or that every disposition finally resolves itself into one or other of the foregoing modes. The reality will be best illustrated by taking two assurances of the most opposite character ; a mere conveyance on a sale, and a settlement on marriage, containing the usual provisions for the affiancing parties and their issue.

In order to preserve the absolute dominion over his property, every purchaser seeks to protect it from his wife's title to dower ; which attaches only where he is himself seised in fee, in consequence of the whole legal estate, whether by way of seisin or of use, vesting in himself. This object may be effected, where the conveyance is to uses, by limiting the use in the first instance, not to himself, but to his appointment ; or by vesting a portion of the estate in a trustee ; or, as is most frequently the case, by both these means. Thus, the fee at common law being conveyed to the purchaser, the use is limited to his appointment by deed or will ; under which he may dispose of the use, without its ever residing in himself. Until and in default of his appointment, the uses are limited, with a technical refinement, (which it would be useless to explain here ; but which will appear in the precedent given of a purchase-deed at the end of this essay,) so as to place an eventual and shadowy portion of them in a trustee, for a period which will expire with the life of the purchaser ; and thus

prevent the whole fee from uniting in the latter; and, at the same time, permit it, on his death, to pass to his heir or devisee.

In addition to the complication which these technicalities introduce into a simple transfer of property, they entail further burdens upon every derivative conveyance under them. Thus, such a conveyance can no longer assume the mere form of a lease and release; but it also contains an execution of the power of appointment; and then the use to be declared upon it arises out of the seisin of the preceding conveyance, as far as respects the appointment; and out of the seisin of the second conveyance, as far as respects the release. Country practitioners, and others who are not versed in the daily practice of this legal lore, frequently appoint *the use* of the first conveyance (I entreat attention) *to* the second purchaser, instead of *to the subsequent limitations* (being those intended to bar dower). This occasions the legal fee, under the use of the first conveyance, to vest in the second purchaser, and dower attaches upon it, which at once frustrates the sole purpose for which all the cumbrous machinery has been introduced. Another, and not an infrequent mistake is, to *appoint* (which refers to the former use) and *release* (which refers to the actual seisin) by the same set of words; so that it cannot be clearly ascertained under which of the two modes of operation the conveyance was meant to take effect. Hence uncertainty of title, doubtful rights, and tedious and costly litigation!

I shall next illustrate the operation of our three-fold system, upon a more complicated disposition of interests, a family settlement; viewing it merely in its formal parts, without considering here the wisdom or the impolicy of its provisions.

The ground-work of its operation is, a conveyance of the fee at common law, to one who is called *the grantee or releasee to uses*. His functions and his interest, however, are merely nominal. Next occur the legal uses, which, under the operation of 27 Hen. VIII., carve out this common-law fee into modified interests, and form the essential part of the provisions. They are limited, either to the husband for his life, then to the wife for her life; or else (which is the more usual, and also the more rational mode, where the estate is not the wife's) to the husband only, with a rent-charge, after his death, to the wife for her life; and in either case, after or subject to her interest, to each of the sons of the marriage successively, according to his seniority, and his issue; or what is called in tail; with remainder to the daughters in equal shares in tail; and generally, in failure of issue of the marriage, the ultimate use or reversion is to the right heirs of the settlor. As the eldest son, however, takes exclusively on the parents' death, a provision for the other children of the marriage is necessary. This is effected by charging the estate with a sum of money for their portions, to vest ordinarily in the younger sons at the age of twenty-one, and in the daughters of that age or on marriage; with

provisions for their maintenance, to the extent of a low rate of interest of their eventual portions, in the interim ; and for advancing a portion of the principal during their minorities, if necessary.

Such, with powers of leasing, selling, and exchanging the lands, (which the limited estate of the tenant for life, and the incompetency of an infant tenant in tail, render necessary,) is the substance of a marriage settlement ; but the inaptitude of the system of tenures, and, to a degree, of that of legal uses, to the foregoing modifications, has given rise to many circuitous and uncouth inventions.

By the doctrine of tenures, the tenant in possession, as has been already explained, is intrusted with the seisin, and may, by certain technical acts, effect an imaginary disturbance and ouster of it ; which, in the instance of a settlement, would destroy the contingent remainders to the issue. To prevent this, a limitation is interposed between those to the parent and to the issue, to trustees to preserve the contingent remainders ; under which the trustees are supposed to enter, or to have a right of so doing, in order to preserve the contingent remainders, in the event of any such technical disturbance.

The widow's jointure rent, if any, next demands remark. A rent-charge may be granted, both at common-law and by way of use ; but to give it effect, a special power of distraining was formerly requisite. This necessity is now removed by a

Statute of Geo. II., under which the widow may distrain of right. The distraining clause, however, is still continued; and added to it is a power of entry, and detention of possession till payment. To provide also for any arrears, either in the jointress's lifetime, or on her death, a technical term of years (usually 99) is limited to trustees for raising them by sale or mortgage. To avail herself, however, of *this* remedy, the widow or her personal representatives must act through the medium of the trustees; and if they decline, or are incompetent, recourse must be had to a court of equity; while, but for tenures, the same powers might, with equal propriety, be given to the parties themselves, for the arrears, as for the current rent. The result is that, under the law *as it stands*, the rent-charge, during the jointress's life, may be levied without any power. On her death, however, a special power is necessary for the arrears; but the power alone would suffice, if given to her representatives; and would without a term be preferable to it, as exercisable by the claimants themselves. Under the law *as it ought to be*, namely, by extending the powers given by the Act of Geo. II., to arrears due at the death, no power, term, or trust whatever, would be necessary.

On the usual mode of providing for the younger children's portions, namely, by limiting a long term to trustees for raising them, with provisions for their education and maintenance in the interim, by

means of the rents, and of sale or mortgage, observations to nearly the same effect might be repeated. Ordinarily, the trustees are not authorized to give a discharge for the money so raised ; but this must be done by the children entitled to it. There is no other occasion, therefore, for the interposition of trustees, than the inaptitude of legal uses to effect the object. Were legal charges, with inherent powers of entry, and sale or mortgage, allowed, the children and their guardians might themselves enforce their claims at law, instead of doing so through the medium of trustees, who act with reluctance, while living ; and on their deaths, their personal representatives must be traced, or created, with much delay and expense.

Sect. 4. *Of Warranty, and Covenants for the Title.*

Warranty, correctly speaking, was of feudal origin ; and it subsisted so long only as a lord might make grants of land, *to be holden of himself*. This, as it imposed upon the grantee the duties of tenure, bound the lord by a reciprocal obligation, either to protect the tenant in his fief, or to find him another ; a liability which descended to the heir of the grantor, as long as he had any lands to answer it. But this species of warranty was early extinguished by the statute of *Quia Emptores*, (18

Edw. I.) which prohibited subinfeudation; but allowed every free-tenant to aliene his lands; to be holden, not of himself, but of the superior lord, by the same rents and services as the tenant himself held them; so that no relation of tenure arose between the grantor and the grantee. The former was, however, held to be bound by a warranty, implied from the word *dedi*, or by force of his gift during his life; but on his death, all relation between his heir and the grantee ceased.—Express warranties were in consequence resorted to, for binding the grantor and his heirs to make recompense, in case of eviction; but this obligation was cast on the heir only where assets, or land, descended from the grantor, to answer the warranty.

The statute *de donis*, or of entails, which was passed only five years before, (13 Edw. I.) introduced some new and nice distinctions on the subject of warranty. In order to afford the issue the protection intended him by the statute, the alienation of his ancestor, tenant in tail, was not permitted to bind the land entailed, unless *with* assets; but, as a remainder-man was not within the statute, the alienation of the tenant in tail, with warranty, bound him, where it descended, as to the land, either with or without assets, as before. Another distinction in warranties is, between *lineal* and *collateral*. It has reference, not to the affinity between the ancestor and the heir, but to the estate aliened by the former, to which the warranty at-

taches ; namely, if it be an interest which would otherwise have descended from the alienor, as a fee, then it is lineal ; but if the heir's title proceed from another quarter, as where the alienor is tenant for life, or in tail, with remainder *by purchase* to the heir, then, as they are strangers in point of estate, the warranty is collateral. But this latter warranty had the singular effect (for which various technical reasons have been assigned by different writers) of binding the land even without assets ; unless where the legislature from time to time interfered, to prevent so glaring an injustice.

The salutary fictions, however, of fines and recoveries, by which the rightful alienation of entailed property was allowed, greatly diminished the subtle distinctions of warranties, lineal and collateral, and with and without assets ; which principally prevailed on *discontinuancies*, as they are called, (or wrongful alienations,) by tenants in tail. A statute of modern times, 4 and 5 Anne, c. 16, by rendering void all warranties of tenant for life, and all *collateral* warranties of any ancestor who has not an estate in possession, as against the heir, has reduced the remainder of the doctrine of warranty to nearly a dead letter. I shall, therefore, conclude this brief account, by referring to the characteristic observations of Lord Chief Justice Vaughan, (Vaug. Rep. 360) on the subject ; the concluding passage of which commences with saying, " The doctrine of the binding of lineal and collateral

warranties, or their not binding, is an extraction out of men's brains and speculations, many scores of years after the statute *de donis*."

In an early part of this essay, I have considered the law of tenures, as introduced among us by the Norman feudists, and soon so largely refined upon, as to have been a system rather of the pen than the sword. One, among many questions, to which the intricate doctrine of warranty, when deflected from its feudal origin, gave rise, was, whether the word "*grant*" implied a warranty; and this import was attributed to it in a very qualified manner only. In the spirit of military grants it would have been answered, it not merely *implies*, but actually *is* a warranty; "*grant*" being only a contraction of "*guarrant*;" or, I will *war* for it (the fief), or defend it, and you, my tenant, in respect of it, with my sword!

To the protection of warranty has succeeded that of *covenants for the title*. These, under the modern practice, are entered into by the grantor, on every occasion of an assurance for a valuable consideration (which presupposes a contract), whether on sale, marriage-settlement, mortgage, or otherwise. In the instance of mortgage they are absolute, or extend against all rightful adverse claimants whatever; but on sales, marriage-settlements, or other conveyances of the absolute interest, the practice is to confine them to the acts of the grantor, and of the preceding owners who have *not* entered into cove-

nants for the title ; of which negative description all persons dying seised, whether testate or intestate, necessarily are. The professed rule is, that there should be a chain of covenants throughout the title, connecting those of the alienor with those of the preceding owner, who has last covenanted.

To this rule, however, there are the following several objections—of principle, of expediency, and of precedent. First, such a qualified warranty never actually enters the contemplation of the contracting parties. Whoever acquires land at its full value, expects an equally complete or indefeasible title to it. The notion of concatenated fractions of an entire obligation, rendering the alienor answerable for the faults of the first link only, and then referring the alienee, for all prior defects, to the exhausted assets of long-deceased strangers, is too revolting to suppose it would be accepted, as a guarantee, by any purchaser to whom it was once explained. Should it be urged—You have the title to inspect—he would reply—Such are the complications of real property, and the inadequate means of search, that, with all reasonable diligence, defects must often remain undiscovered ; and a purchaser is not concluded by *latent* faults. Under the *Roman* law, the seller, on the eviction of the purchaser, was answerable to him for the loss, under certain qualifications, interposed for the protection of the former. The *Code Napoleon*(a), in framing which both precedent and principle were fully discussed, (and the

(a) 1626—1840.

subject is a general one,) imposes an absolute warranty on a seller, in case of eviction, to be answered in damages, the amount of which is chiefly regulated by the price, and by subsequent permanent improvements.

Sect. 5.—*Of Alienation by Will.*

The feudal tenure, conferring lands originally on the tenant for his life only, and afterwards on him and his heirs, rendering certain services of the sword or the plough, necessarily excluded the power of testamentary disposition to a stranger. This restriction was early eluded by the invention of uses; but when uses were legalized by the statute of 27 Hen. VIII., and consequently subjected to the restraints of common law interests, the indirect power of testamentary disposition over lands ceased. This disability was shortly removed by 32 Hen. VIII., which enacted, that all persons *having* lands, might, by their last will in writing, devise(*a*) the whole of them, if held in socage, and two-thirds if held in chivalry. Then followed, first the statute of 12 Car. II., c. 24, converting lands held in chivalry into free socage, and thereby extending the testamentary power to the entirety; and next that of 29 Car. II. c. 3, requiring all devises of lands to be signed by the testator, or in his presence by

(*a*) Devisare est distribuere.—*Menage*.

his direction, and to be attested and subscribed in his presence by three or four credible witnesses.

As the formalities of an instrument should precede its substance, the object and effect of the last act will be first stated. It was passed to prevent the frauds consequent upon the loose documents of mere writing, whether signed or not, which the act of 38 Hen. VIII. was held to sanction as wills. The act of Charles passed perhaps into the other extreme. The solemnities it required were novel in their character, and much more minute than those required in executing a deed. Frequent questions consequently arose upon them; such as, whether a testator himself writing his name at the beginning of his will, was *signing*? Whether *sealing* was *signing*? Whether the testator's acknowledgment of his hand-writing, before the witnesses, was equivalent to his *signing* before them? What amounted to an attestation and subscription of the will, in the presence of the testator? Whether the note of attestation need state all the requisite circumstances; or whether those omitted might be presumed? Whether the witnesses need all attest together? To what extent the due attestation of a codicil, referring to an unattested will, would set up the latter? And, *vice versâ*, whether, where a will was duly executed, a power or a charge under it could be executed by an unattested codicil?

These, and other similar questions, have now, for the most part, received judicial decisions; but

they form in themselves a mass of distinctions, and a body of determinations, of no ordinary size, upon the mere solemnities of one single instrument.

The word "*having*," in the statute of 32 Hen. VIII., was construed to confine testamentary disposition under it to such lands only as a testator was entitled to, either in possession or expectancy, when he made his will. With respect to these, indeed, it has been construed liberally, it being held to include whatever description of interest the testator had, however precarious, as contingent remainders, springing uses, and executory devises, none of which could be legally conveyed by deed. In short, whatever is descendible to the heir, is held to be devisable. Being confined, however, to actual property, a devise of land could not, as in the instance of personal estate, affect any after-acquired lands. These may be passed, first by a codicil, containing a specific description of them; and next by a republication of the will, where that contains a general or residuary devise of the testator's real estate; and such act may be either express or implied; as where a codicil, duly attested, is annexed, or refers to the will. Codicils, however, occur occasionally, so defined and limited in their object, as to preclude all such presumptive intention. These, of course, form exceptions; but they divide themselves into individual cases, irreducible to any general rule.

Another consequence of the faculty of devising

being confined to the testator's actual landed property, arises from the distorted modes of charging lands for the benefit of creditors, either individual or collective. The former mode constitutes mortgages. The latter, deeds of trust, for the benefit of general creditors, or a class of creditors. These are effected, (as already observed on the subject of mortgages,) by a conveyance of the legal estate, which produces a revocation at law of any prior devise of it. But the object being merely the security, courts of equity have treated every such conveyance as, a partial revocation only (or *pro tanto*, as it is called) of the will, and have considered the mortgagee a trustee for the purpose of the will, subject to his charge. They have also viewed in like manner the heir of a testator, who, upon discharging the security, has taken a reconveyance to himself. In the latter case, however, the testator, for the purpose of making the land more completely his own, by preventing the legal claim of dower, frequently takes or directs the reconveyance to such uses as he shall appoint; or, to himself and a trustee for him. These, though in reality only dispositions of the testator's original property, so inflected as to render his ownership more absolute, have been held, even in equity, such modifications of it as to render it a different property from what he had before devised; and, consequently, to prevent it passing by his will. Where, however, instead of a partial, the whole interest in

a mortgaged estate is, on satisfying the charge, conveyed to a trustee, this is held not to revoke a prior devise of it. Thus a partial divestment of the legal interest effects that revocation of a will which an entire one does not!

The same dispositions of land, with its various modifications of interest, and under the same restrictions against perpetuities, may be made by devise, as by limitations by deed, of legal uses; with this mere difference of phrase, that *springing uses, in deeds*, are, *in wills*, called *executory devises*. Trusts, also, are alike introducible upon legal devises. In the mode of creating these different interests, however, much greater latitude has been permitted in wills.

By the civil law, land was divided into a right to the profits (or *usufruct*), most commonly for life, and the absolute property (or *nomen*)(a). If only the former was meant to be given, it was limited accordingly. But a simple gift of the land passed the whole interest in it; and such is still the case, even by the English law, as to personalty. On the introduction of tenures, however, lands were originally

(a) Speaking of his villa at Twickenham, of which he had sold the reversion to Mr. Vernon, Pope says (Imit. Hor. l. ii. s. 2. 164.),

“ Well, if the *use* be mine, what can it concern one,
Whether the *name* belong to Pope or Vernon ?”

By what circumstance could Pope have acquired so accurate a knowledge of these technical terms ?

granted out to the tenant for his life only. Afterwards, the grant was extended to his heirs. But, to have this effect, it was necessary the grant should be so expressed. This reversed the more natural order of the civil law; and, instead of a mere gift of the land passing the entire property, terms of art (or words of limitation, as they are called) were required to be annexed to the grant, making it both to the donee and *his heirs*. From the technical inexperience, however, of testators, or those around them, these latter words were frequently omitted, and the clearest intention was consequently frustrated. To prevent this injustice, courts of law, feeling themselves freed, in testamentary questions, from the trammels of tenures, but not choosing to violate the old rule, that a gift of land, without more, passed an estate for life, seized, wherever they could, other expressions or circumstances, as indicative of an intention to pass a fee: such as the words, “real estate—testamentary estate—residue of estate—real property.” So, introductory words to the will, expressive of testator’s intention to pass all his property—thus: “As touching my worldly estate, I give and devise *the same* in the following manner:” and these followed by a mere gift of land. Again, where land is given to one, he paying the testator’s debts; or, (though this seems, from modern cases, to admit of some qualification) charged, in the devisee’s hands, with debts or legacies, or an annuity—all, or any of these

circumstances have been held to pass a fee ; although the devises did not contain any express words of inheritance.

Where, however, instead of denying the general application of a rule, as that which requires words of inheritance to pass a fee, it is sought to elude it by means of special circumstances, these must necessarily generate numerous distinctions ; and, while many cases would indicate, others would be considered as falling short of, an intention to pass a fee, without words of inheritance. Thus, where a gift of an estate is followed by a description of the occupiers, or of the tenements of which it consists ;—also, where the introductory clause is, “ As to my worldly estate, I give and dispose (without saying ‘ *of the same*’) as follows ;”—again, where the charge of debts or legacies is not upon the devisee personally, or upon the land *in his hands* : in these, and similar cases, the devisee has been held to take for life only.

Various other cases exist, in which a fee has been held to pass, though words of inheritance were wanting. Some from similar inferences of intent in favour of the devisee ; as, where the gift has been to one simply ; and if he died under the age of twenty-one, then to another, whose interest, consequently, did not depend on the mere death of the first devisee. Again, where the devise was to trustees and their heirs, in trust for another, but without any words of inheritance as to the latter ;

who was, however, considered as meant to take an interest commensurate with that of his trustees. Others of such cases have been so decided for preventing manifest injustice ; as, where land has been given to trustees, to sell, or to pay debts ; in which last instance it may be remarked, that courts of law, though they have refused to take direct cognizance of trusts, have yet found it necessary to notice and allow of them.

The like aid to a testator's intention has been given by the decisions respecting constructive estates tail in wills. To create an estate tail by deed, the usual limitation is, to one and the heirs of his body. But these terms of inheritance, or of procreation, have been largely supplied in wills, in favour of the intent. Thus—

Where a devise is, to one and his issue ; or, to one and his children, he having none at the time of the will ; or, to one, and if he die without issue, then to another. In the two former gifts, the words "*issue*" and "*children*," have been construed "heirs of the body." In the latter, these heirs have been implied. Again, a devise to one and his heirs ; and if he die without issue, then to another, is held an estate tail ; because such an estate terminates on failure of issue. So is a devise to one and his heirs ; and if he die without issue, then to another, who is a collateral relation of the first devisee ; since there could not be a failure of heirs general of the former, while the latter was in existence. So, a gift to one and his heirs male

(which, in a deed, would pass a fee-simple), is held to create an estate in tail male in a will, in favour of the intent to give the land in the male line.

Many more instances of a similar kind might be cited ; but the foregoing abundantly show the disposition of judges, in more modern times, to evade technical rules in favour of the intent, wherever they conceived themselves at liberty. As they were not prepared, however, to go the full length of holding, in cases of implied fees-simple, that the gift of the land was a gift of all the testator's property in it, they have effected their object by distinctions, so numerous and so complicated, as to render their decisions of doubtful benefit. The refinements on testamentary estates tail by implication, which have converted a settled *formula* into a series of individual cases, obscurely shading down from a fee-simple to a fee-tail, and often terminating in a mere estate for life, with remainder to the issue *by purchase*, amply demonstrate that rules of law, where they work injustice, should be repealed, not evaded.

Sect. 6.—*Of Powers in general.*

The several preceding modes of disposition are supposed to emanate from *the estate* of the alienor. By means, however, of what are technically called POWERS, a greater interest may be conferred than

what the alienor himself possesses. Thus, a tenant in tail, or for life, or even one devoid of any estate whatever, may grant a perpetuity, or an estate tail, or for life or years ; or he may charge the property with a rent, or a given sum of money. Of the origin, nature, and operation of this right, a brief statement will be given—premising, that the person conferring the power is called *the donor* ; the person executing it the *appointor* ; and the person in whose favour it is executed, *the appointee*.

In the system of tenures, which admitted only of estates for life and of inheritance, under stated services, powers were unknown, and impracticable. That of uses, however, soon introduced various new modifications of property, which have resolved themselves, for the most part, into limitations in strict settlement, on individuals and their families, by deed or will. While, on the one hand, these restrain alienation by the parent or other tenant for life ; on the other, acts of ownership became necessary, with relation either to the property settled, or the objects of the settlement. The former constantly requires to be leased to tenants, or occasionally to be sold or exchanged, for the purpose of discharging incumbrances, or for the better arrangement of the property ; or, where consisting of an undivided share, to become susceptible of partition. The objects of the settlement may consist of children, in whose favour, or of that of the younger branches, the estate may require to be

divided, or to be charged with provisions; or of tenants for life, who might marry to better advantage, if enabled to grant jointures to their wives, or portions for their younger children. Sometimes too, the settlor of an estate chooses to reserve to himself the power of altering his dispositions. This he effects, either by a general power of appointment in the first instance, or else by annexing to the limitations a power of revocation and new appointment.

The rights of married women also received a large extension by the doctrine of powers, in a manner which has been already noticed.

No. 1.—Of the Division of Actual Powers.

Powers are technically divided into—1. Appendant, or appurtenant. 2. Collateral, or in gross. 3. *Simply* collateral—all of them phrases which apply rather to the estate of the appointor, independent of his power, than to the power itself. By the *first* are meant such as must originate out of, and *may* continue during the estate of the party executing the power; as where a tenant for life has a power to grant leases in possession. By the *second*, such as are given to a person having or taking an interest in the land, but which cannot attach upon that interest; as a power to a tenant for life, to appoint a jointure to his wife, or portions to his younger

children, to take effect after his death. Powers given to strangers to the land, to dispose of it, or charge it for their own benefit, are also of this class. By the *third* description are intended, powers given to persons having no interest whatever in the land, to appoint in favour of some other *specified* person, or class of persons. As terms of distinction, the second and the third classes are not happily named.

The chief practical application of this division consists in the modes by which powers may be suspended, destroyed, or released. The general rule is, that a power shall not be exercised in derogation of a prior grant by the appointor; as of a lease or a rent. This, however, is not always adhered to; since if tenant for life, with a power appendant, aliene his estate; and then, in exercise of his power, grant a lease, or a rent, to endure beyond his own life, the prior alienation will wholly deprive this appointment of its effect; and yet the above reason should not prevent its operating after the appointor's death, when any right carved out of his *estate* must cease. The like objection often arises in the instance of mortgages, which, as has been shown, are effected in our law, not by a mere charge, but frequently by a conveyance of all the legal estate of the mortgagor, subject to redemption in equity. The object is only the security; but, as his whole legal interest is departed with, his power, where appendant, is held to be totally de-

stroyed (a). On the other hand, where the donee of a power *simply collateral*, exercises, or assumes to exercise, any act of ownership over the land which interferes with his power, it is contrary to good faith that he should gainsay his own deed, by any subsequent execution of the power.

Another technical mode of distinction occurs in powers *in gross*, from principles of tenure ; where a partial owner, having such a power, conveys his *estate* by lease and release, or bargain and sale (which are termed innocent conveyances, as not affecting the seisin), these do not destroy the power. Where, however, he conveys by feoffment, or, with some qualification, by fine, these, as they are *legally* supposed to disturb the whole seisin on which the limitations rest, destroy his powers in gross. In effect, however, they are but mere modes of conveyance, to which no further operation was intended, or should be given, than to pass the interest of the party, with which this power, being subsequent to it, did not interfere.

Enough, it is presumed, has been stated to show that the classification of powers is too artificial, and

(a) Nay, so far is it carried, that if a tenant for life, with such a power, joins in conveying for the mere purpose of suffering a recovery (taking back his own estate), he must pass to the tenant of the freehold a partial or a modified interest only, as for their *joint* lives, or under a condition to be void on nonpayment of a large nominal sum (say 50,000*l.*) after the completion of the recovery, so as to preserve or regain his original estate, or else the power is lost !

devoid of practical result ; and that the doctrine of tenures and legal estates, frequently occasions their destruction, in opposition to the intent, to expediency, and to justice. Under a more simple system, powers would perhaps sufficiently resolve themselves into *general* powers, exerciseable in favour of whomever the appointor chooses ; and *particular* powers, exerciseable in favour of specified objects. In neither instance should any act of the appointor extinguish or affect them, further than may be incompatible with the exercise of the power.

No. 2.—Of Appointments under Powers.

First. With Reference to the Instrument and its Solemnities.

I shall next proceed to some brief observations on appointments in the execution of powers. The solemnities generally annexed to them demand the first attention.

To an ordinary deed, for passing an interest at common law, or rendered legal by the statute of uses, the only essential solemnities are—signing, sealing, and delivery, with attestation by one witness or more. The creation of an use, or a trust, and the conveyance of a trust or equitable estate, require only (under 29 Charles II. c. 3) to be in writing, and signed by the party. From analogy, or rather habit, however, deeds, with their usual

solemnities, are also used for these latter purposes ; but, as to powers, though a species of use, or trust, according to their legal or equitable quality, the donor of them has been inadvertently allowed to annex to their execution whatever legal formalities he pleases ; such as “ signed, *sealed, and delivered*, in the presence of, *and attested by*, two or more witnesses ;” it being the more ordinary practice, in executing deeds, to have only one witness ; and (from the illiterate state of former times) to notice, in the memorandum of attestation, the sealing only, and not the signing. From their being unusual, the above and similar peculiar requisites, when annexed to an appointment, are often overlooked, or but imperfectly attended to. Hence many proper appointments either fail of effect, or are rendered questionable. The glaring injustice, however, that the omission of an arbitrary and idle ceremony should invalidate a solemn act, lately occasioned the legislature to supply the defect as to past cases ; though not *prospectively* (a). Future cases rest as before, with the assistance only of a legislative lesson, which will soon be forgotten.

The latitude allowed to the donors of powers, of prescribing their own rules for exercising them, has introduced a refinement as to the nature of the instrument by which this may be done. The difference, in the general law, between a deed and a

(a) By 54 Geo. III. c. 168.

will, is too well known and felt to need repeating. Powers, however, are frequently given, to be exercised in a mode which makes it doubtful whether a deed or a will be intended ; or whether either, indifferently, of these two instruments, will not suffice ; as, to be executed “ by writing under the appointor’s hand and seal.” This, though savouring, in the latter words, of a deed, has been held to authorize an appointment by will, having the solemnities of signing and sealing ; a resolution which has been carried still further, in one celebrated instance, where the power was to revoke, by *any writing* under *the hand and seal* of the donee, attested by two or more credible witnesses ; and by the same, or any other *deed*, to limit new uses. In order to support a testamentary appointment, even this power was, by much subtilty of reasoning, held to be well executed by *will*.

Nor, where the power is confined to a will, is the appointment, if in its nature testamentary, rejected, although it may have the usual concomitants of a deed ; as, being stamped, and sealed, and delivered.

With some question as to its correctness, but certainly none as to its impolicy, another peculiarity attending powers is, that where the execution is to be simply by will, there it may be exercised without the formalities required by the statute of frauds (29 Charles II.), to a will of lands, *unless it be reserved by the donor to himself*. This seems to have

proceeded upon an overstrict construction of the words of the statute of wills (32 Hen. VIII.), whereby "all persons *having* lands—may devise," &c. These a mere donor of a power literally has not; but surely, whoever has the disposition of lands, may, in a general sense, be said to *have* them. Indeed, in other respects, such as being revocable by the appointor, the disposition lapsing by the death of the donee in the appointor's lifetime; a testamentary appointment carries the legal qualities of a will. It seems more reasonable, therefore, to render what is now the exception the rule, as to the testamentary execution of powers.

Secondly. *As to the Periods from which Appointments Operate.*

In this view of the subject, *general* powers may be considered as equivalent to the absolute ownership, and operate, therefore, as assurances of interests do, from the period of their *execution*, if by deed; and from the appointor's death, if by will. *Particular* powers, however, emanate, in their objects, from the will of the donor, and not of the donee; and operate from the period when that intention was expressed by their creation. They are restricted, not only by the donor, to the objects or interests authorized; but also by the law, which, for the prevention of perpetuities, disallows any appointee to be named, who could not take by the

instrument conferring the power ; since otherwise there would be an undue protraction of the period of vesting or enjoyment. Thus, under a power in a settlement to appoint to his issue, an appointor cannot render a son, unborn at the time of the settlement, tenant for life, with remainder to the use of the sons of that son *as purchasers*, or in their own right ; since, by the general law, an estate cannot be rendered inalienable for two future generations.

Thirdly. *As to the Appointees.*

In the exercise of *particular* powers, it is a disadvantage inherent, and not remediable, (as in the case of inattention to mere formalities,) that the appointor frequently overlooks the precise objects or interests to which his authority is limited.

Thus, with respect to the former, the donee of a power to appoint to future children, often limits to such a child for life, with remainder to its issue *as purchasers* ; or, having a power to share and divide property *between* children, he appoints to some of them in exclusion of the others. These are generally considered excesses of the power, which render the appointments void. In some instances, indeed, the appointment has been construed *cypres*, as it is called, namely, by considering the child, who is the appointee, as taking an estate tail, by which means his issue would take through him ; but this

construction has been adopted with much limitation and distinction. It is confined to appointments by will—to cases where the appointment clearly intended the issue of the child appointee to take, in the same manner as if the child had taken an estate tail ; which would exclude a disposition to *such* issue as their parent should appoint ; or, (in principle,) to issue in equal shares :—and again, it is restricted to appointments of *real* estate ; since an estate tail cannot be created in personalty ; and consequently the issue could not take by transmission through the child. Other distinctions are made, in support of the execution, where part of the appointees are objects of the power, and part not ; but the excess can be distinguished. Thus, where the doctrine of *cypres* is not admitted, the appointment *to the child* is allowed, though the remainder to its issue is rejected. On the other hand, where the excess in the objects is not distinguishable ; as where the appointment is to a child within the power, and his family generally ; or *after a general failure of issue*, to a class of children, some only of whom were *in esse* when the power took effect, the appointment is bad as to all.

Where the power comprises several objects, it has often been a question whether, under the terms of a power, the appointment may be made to some of them, in exclusion of the others ; or whether each of them must not have a share. This doubt

has chiefly arisen where *children* have been the objects. Thus, a power to appoint to *such* of a class of children as the appointee shall think fit, clearly warrants an *exclusive* appointment. On the other hand, under a power to appoint to *all and every* the child and children, or *among the* children, in such shares, &c., *each* child must have a share. But, in the various phraseology used by different donors, the word '*such*' has been frequently so controlled by other expressions, as to render its excluding import very questionable. For instance, "unto and *amongst* such children, and in such proportions ;" or unto and amongst *all* such child or children, in such parts, &c. These cases have received opposite constructions ; the former being held a distributive, and the latter an exclusive power. They are selected from numerous others as sufficient, with the previous observations respecting excesses in the objects of powers, to show the extent of technical refinement, and consequent accumulation of law, to which this branch of appointments has unavoidably given rise.

Fourthly. *As to the Subject of the Appointment.*

Excesses in the quantity of interest, or the extent of the property ; or deviations from the mode prescribed of giving it, are also of constant occurrence.

Before proceeding to instances, it may be ob-

served that, in the construction of powers, whether given by deed or will, courts have, as in testamentary dispositions, dispensed with the necessity for words of inheritance to pass a fee ; and have allowed equal force to expressions tantamount ; as, to the use of any person to whom the donor should devise any *estate* in the premises ; or, to the lawful issue of one, in such parts, *manner*, and *form*, as she should appoint. In the instance, therefore, of powers, even created by deed, as well as of wills, has the intention prevailed, in more modern times, over a technical expression, originating in habits of society, and modes of possession long obsolete.

Excesses in quantity of interest most frequently occur in leases ; as where, under a power to lease for twenty-one years, the lease is made for twenty-five ; in which case the better opinion is, that it is void at law ; but that, in equity, it is so for the excess only ; *that* being, it is said, distinguishable. Distinctions often arise as to powers to grant leases in reversion. General policy excludes them in all cases. They are also excluded of course, wherever the power is expressly to lease in possession. Where it is to lease without this restriction, the general right seems hitherto unsettled, the decisions having principally turned upon the particular wording of the cases ; but the inclination of legal opinion is against it, in cases of private powers. In the instance indeed of bishops, leasing under the statutory restrictions of 18 Eliz.,

the restraint is evaded by means of what are called 'concurrent leases;' as, where the bishop, there being a subsisting lease for the term allowed, grants a further term, to commence *in presenti*; but this, in the better opinion, is a solitary instance.

The quantum of rent to be reserved, and the mode of reservation form other sources of question.

Sometimes the ancient or usual rent is required; though this is much discontinued in private powers, where the disadvantage of letting for lives, and taking fines, is perceived; and it subsists chiefly as to ecclesiastical persons leasing under statutory powers. As to these, much strictness has properly been required. Thus, the rent must be payable at the same days, *viz.*, not half-yearly, where usually reserved quarterly. Two farms, not usually let together, cannot, it is thought, be joined in one lease; nor, till the doubt was removed by a late act(a), was a lease of part, at a rent *pro rata*, considered valid.

Leases of property, partly within a power, and partly not, at one entire rent, are of course void; unless where the rent is capable of distinct appropriation, as in a lease of land at 20*s.* an acre, or of mines under a royalty of so much per ton.

Leases frequently fail, too, from the omission, or an unwarranted qualification, of other requisites; as, where the power demands a proviso for re-entry

(a) 40 Geo. III. c. 41.

on nonpayment of rent, and the lease clogs it with the qualification of—*being demanded*, or, *no sufficient distress found*—or, where the proper covenants are not inserted.

The description of property which may be demised becomes sometimes questionable; as where the power extends to lands *usually* letten; or reserving the *usual* rents. For the reason already given, these questions occur chiefly, and with the greatest complication, as to leases by ecclesiastical persons. But they occasionally arise on leases under private powers; which have been held to exclude the mansion-house, and the demesne lands held with it, and land not leased within twenty years. Other distinctions have been made under the particular wording of these powers.

On the cases which have occurred respecting leases under powers, it must be observed, that they have not originated in any of the technicalities with which our law of real property is surrounded; and that they have been adjudged with that strong and clear sense which, though somewhat tempered with subtilty, accompanies the bulk of our legal decisions, where unembarrassed by tenures or fictions. Still where the acts to be performed, and their terms and conditions are so constricted, this peculiar mode of disposition must ever form an ample source of litigation; until either restrained within defined limits; or, (which would be far preferable,) rendered inherent to the estates of per-

sons having partial estates ; as in the instance of leases by ecclesiastical persons ; or under inclosure acts ; the principle of which is worthy of imitation, however faulty may be the actual provisions.

Fifthly. Of Equitable Interference.

The rigour with which courts of law adhered to the precise acts and modes warranted by the power, occasioned the early interference of equity, to remedy appointments defective in these respects, by holding whoever took the estate in default of execution, a trustee for any defective appointment under it. Acting, however, upon its rule of administering redress in those cases only, which possess a meritorious claim, it has, with doubtful policy, and certainly in derogation of the principle of impartial justice, confined its relief (with a few exceptions, which will be briefly noticed) to the favoured objects of wives, children, creditors, and purchasers. To exercise, in equity, a power in favour of any of these, it is only necessary, that the intention appear clearly in writing ; whether in the shape of a covenant, a contract, or other declaration of it. Where this relief is extended, equity disregards, not only formalities, but even the instrument to which a power is confined ; as in case of an execution, by will, of a power required to be executed by deed. The converse, however, of the case forms a peculiar exception to this.

equitable jurisdiction ; and with reason ; since a power to appoint by will precludes all contract ; and, in the instance of a married woman, it protects her against any marital influence.

Equity has ever applied this jurisdiction to cases where an interest has been given of a totally different description from that authorized. Thus, a power to appoint the land to children, has been held well-exercised by *a charge* of money, or by a gift of the land to trustees, *to sell* for their benefit ; a mode of disposition which converts the appointable interest from real into personal estate. The decisions, which have held a power to charge land in favour of children well executed, by a direction to sell for their benefit, are of a less violent character ; as they do not alter the nature of the property, but merely countenance a more efficient mode.

While powers however remain, the latitude of construction, assumed by courts of equity in favoured cases, puts at defiance all fixed principles of jurisprudence ; and that they prevail in these cases only, provokes the further objection that, in this branch of jurisprudence, equal justice is not dispensed, but two distinct rules in effect prevail ; one for equitable objects, and the other for those against whom equity closes its doors.

On how much sounder grounds has the legislature recently interfered in the instance which will be hereafter stated, of supplying the want of a

surrender of copyholds to the use of a will! In equity, the rule was, that defects in the execution of powers, and in the want of a surrender to the use of a will, were governed by the same rules. Consequently equity supplied the latter omission for the benefit only of the above favoured objects. By 55 Geo. III. c. 192, however, surrenders to the use of wills were rendered in all cases unnecessary. Were the laws of property capable of being corrected by individual enactments, here would be a direct precedent for supplying defects in the execution of powers in favour of appointees of every description.

The most singular instance, however, of equitable interference, and one not reducible to any principle hitherto noticed, is, in what it has termed *illusory* appointments. The distinction between an exclusive appointment and a distributive one, where there are several objects of a power, has been already shown. In the latter case, each object must have *some* share; but, according to the tenor of the power, and the ordinary rules of construction, the appointor would be warranted in giving to any of the objects whatever share of the fund, even the most minute, he might think proper. But not so in equity, in the instance of children. If an unsubstantial proportion were given to any child, the appointment was there considered as illusory, or a fraud on the power; the intention being, (as was alleged,) that each child should

have a substantial part. Some such assumption was necessary, to warrant its interference in the teeth of the instrument. But, were the appointment treated as an actual fraud, the jurisdiction should have been extended to objects of every description; as next of kin, &c., since, where fraud is concerned, these fall equally within the scope of equitable relief. Were it reposed upon the mere ground of the donor's intention, this might have been best ascertained, in general cases, by observing how powers have been framed, since this species of jurisdiction became frequent. Have donors themselves ever prescribed what should be deemed a substantial share; as a fourth, or a sixth at least? On the contrary, the subsequent practice has been to render the powers exclusive; leaving it to the appointor's discretion to limit the whole to any one of the objects; and thus protect them against *equitable* justice.

In the mean while, the question soon arose of, *What was* a substantial share? It was, however, more readily raised than answered; and, finding the principle untenable, or at least the rule impracticable, but deeming it too late to abandon an established doctrine, courts of equity have gradually remeasured their steps; and having decided, on one occasion, that a 190th share was unsubstantial; the actual rule is, that any gift short of that disproportion, (in one case a 122d part) is not illusory. Such has been the dilemma between

retraction and imbecility, into which a deviation from the established rules of construction has finally resolved itself!

The preceding remarks are offered, not as a complete outline of the subject of powers; for that, though executed in the most compendious manner, would greatly exceed the limits which can be allowed to this article; while, for practical purposes, the subject at large has already been treated, in recent times, with a clearness and precision not to be surpassed; but merely to exhibit—somewhat of their general nature and effects;—the influence produced upon them by the triple system of tenures, uses, and trusts;—the mischievous consequence of allowing every individual donor of a power to depart, at his own caprice, in prescribing the mode of their execution, from the general rules of law;—the exclusion, in the instance of testamentary appointments, of a great remedial statute, by the narrow interpretation of a prior one;—the multiplication of distinctions, and consequently of questions, introduced by courts of equity, in their attempts either to alleviate the hardships occasioned by the ignorance of these private arbitrary rules, or to curb the appointor's express power within an imaginary line of intention.

How much useless refinement, obscurity, and anomaly, in this subject would vanish, and how much the subject itself might be contracted—By dividing powers into *general* and *particular* only—

By not permitting any theory of disturbance of seisin, or departure with the legal estate without the whole beneficial interest, to operate their destruction, contrary to the intent—By rendering the appointable interests disposable, like others, without any special formalities, or modes, to be annexed to their execution; except in the single instance of a married woman, (who should be required to undergo a judicial examination, wherever her disposition is in the nature of a deed; and whom it may be occasionally necessary to protect, by confining her appointment to will, against any undue influence of her husband,)—By rendering general powers not only assignable, as they are now, in cases of forced alienation, on bankruptcy, and self-declared insolvency, but also extendible by creditors, to whom the same principle applies—And, finally, by annexing legal powers of leasing, selling, exchanging, and, where necessary, making partition, to the estates of all tenants for life, in possession, under settlement by deed or will.

Sect. 7. *Of Involuntary Alienation, or the
Rights of Creditors.*

These are divisible into two classes,—The one affecting the property of the debtor while living,—the other affecting his real and personal representatives, in respect of the property devolved to them, which is called assets (*assez pour satisfaire.*)

No. 1. *Of the Rights of Individual Creditors, inter vivos.*

I have used the general term *property*, because the liens of creditors on realty and personalty do not admit of severance. Originally a creditor, after judgment for his debt, could only apprehend the debtor's person, take and sell his goods and chattels in possession, and receive the profits of his lands. Then the statute of 13 Edw. I. c. 18, allowed judgment creditors, upon insufficiency of chattels, in lieu of apprehending the person, to take, and hold till payment, a moiety of the lands which the debtor was seised of at the time of the judgment given; or (as it has been construed) (a) had afterwards acquired, until the debt was paid.

(a) See the authorities in 2 Cru. Dig. 58.

This, as it is a remedy of the plaintiff's election, is called an *Elegit*. The remedy was extended by 29 Car. 2, c. 3, to estates held in trust for the debtor ; but this, it has been held, does not reach his equity of redemption of a mortgage. Being more efficient than the former remedy against the mere profits of the land, (called a *levari facias*,) it rendered that mode of execution obsolete. The result is that, as the law now stands, a judgment-creditor may take in execution for his debt, his debtor's person and goods, or his lands and goods ; but not his person and lands.

The writ of *elegit*, however, runs only against *freehold* lands. Copyholds are not affected by it, nor indeed in any manner subject to the demands of creditors. They are protected under the fiction, that the lord may choose his tenant. *That* lord, whose only interest lies in his fine, and other customary dues, which he gains on every change ; and *that* tenant whom his copyholder may, at any time, force upon him, by the daily processes of surrender and admittance !

Against freeholds even, this remedy, like many other just rights, is liable to be defeated by the practice, already so often noticed and reprobated, of getting in prior technical interests, as terms for years, judgments, &c.

On the subject of goods leviable in execution, it may be here observed, that *choses in action*, as they are phrased, or whatever are not in actual posses-

sion, are not the subject of legal cognizance, either for transfer, or for levy in execution. In rude uncommercial times such property was of little worth ; usually, household goods and farming-stock, forming literally a *peculium* ; with an occasional obligation or other debt. In modern times, however, this narrow rule excludes the most valuable part of personal property. All ready-money, government and other public stocks, shares in adventures, loans on mortgage and other securities ; in short, money in whatever shape, and every description of credit. That this should be the case is the less defensible, as property of this description constitutes assets for payment of debts in the hands of the executor ; nor, viewing the nature of the property thus unjustly withheld, can it be placed to the account of aristocratic influence in favour of the land. No topic can more completely exemplify the inattention of the public to these laws, which *should be* their most valuable inheritance.

It may be here observed that, by 29 Car. II. c. 3, such goods and chattels *only* are extendible, as the debtor is possessed of at the time of the execution actually sued out, and delivered to the sheriff.

There were indeed obligations of a special nature, called statutes merchant, and of the staple, being a species of recognisance to which, by two statutes of Edw. I. and Edw. III., for the encouragement of rising commerce, more than the ordi-

nary effect of a judgment was given ; namely, that the body, lands, and goods of the debtor might all be taken at once ; but a change of times, and of modes in transacting commercial affairs have rendered these securities obsolete.

The foregoing remedies exist against debtors of every description. Some classes, however, are subjected to peculiar liabilities ; namely, debtors to the crown, of whatever description—bankrupts—and self-declared insolvents. The first of these will be briefly noticed here. The others will form the subjects of the two ensuing heads.

Whoever becomes bound to, or accepts an office from, or is otherwise rendered an accountant to the crown, is, from that moment, considered its debtor, and as such, all the freehold lands which he or any trustee for him is seised of, or in which he has any equity of redemption, or wherein he may afterwards acquire any such interest, before he obtains an exchequer *quictus*, are *extendible* by the crown, into whosoever hands they may pass. Lands and interests in them, so extended, may be sold under various statutes of Eliz. and Geo. III., and the produce applied in discharge of the king's debt. A similar privilege is allowed to the debtor or accountant to the crown, by means of an *extent in aid* ; a process which was made an instrument of much oppression, until, by the recent statute of 57

Geo. III. c. 117, the money leviable under it was confined to the actual amount of the debt which the suitor owed to the crown.

With respect to goods and chattels, they are bound by the debt of the crown, or of its privileged debtors or accountants, after execution awarded, though not delivered to the sheriff; but such description only of them is liable as in the instance of a subject, to the exclusion of all rights or choses in action: a just subject of surprise, considering the ordinary astuteness of revenue officers.

No. 2. Of Bankruptcy.

The foregoing remedies, with the exception of prerogative process, exist against debtors of every description; but, for the creditors of traders becoming insolvent, or doing acts which indicate insolvency, the legislature provided more ample and summary redress, by the transfer and disposal of all their property. This was gradually effected by a long series of enactments, beginning in the reign of Jac. I., all of which have been embodied, with some additions, in the recent act of 6 Geo. IV. c. 16. My present purpose confines me to such parts of it as concern the real property of the property.

On these I shall comment as I proceed; but, on account of the recency of this act, I shall not suggest any alterations in the second part of this essay.

By the former bankrupt laws, the rights of all creditors, even by judgment, were placed upon a par from the time of the act of bankruptcy ; but the prerogative rights of the crown, and, what was still more grievous, the privileged writ of *extent in aid*, in favour of its debtors or accountants, was not barred till actual assignment of the bankrupt's property, which deprived the former of its remedy against the goods, and the latter of any *preference* whatever. To guard against the harshness of the royal privilege, but much more often against the abuse of that of its debtors and accountants, the commissioners used to execute a general assignment to provisional assignees, who afterwards transferred the property to the assignees chosen by the creditors. This frequently occasioned an unseemly race for priority between the extent in aid and the assignment. The act of 57 Geo. III. c. 117, however, confined the remedy under this writ to the money actually due from the suitor to the crown, and thus removed the principal occasion for the provisional assignment. A consequent simplification might have been expected of the mode of transfer under the recent bankrupt act ; such as a declaration rendering the act of bankruptcy binding on the property against all persons, except the crown, its debtors, and accountants, to the extent stated, and purchasers without notice, &c. But not so—the act continues the former complicated and defective machinery.

By sect. 45, provisional assignees are still to be *appointed* by the commissioners, and are afterwards to *assign* to the efficient assignees to be chosen by the creditors, in whom the estate is to be as effectually vested as if the *first* assignment (none being predicated) had been made to them by the commissioners.

With respect to the assignment, by sect. 64, the commissioners are, by deed indented and enrolled, to convey to the efficient assignees, when chosen, all the lands (except copyholds) belonging to the bankrupt (*i. e.* at the time of the bankruptcy), or to be afterwards acquired by him, by purchase, descent, devise, &c., before obtaining his certificate.

On the two preceding sections it is observable, that the former contains no direct enactment for vesting the property in the provisional assignee. It can pass only as an implied consequence of their appointment by the commissioners, to whom neither estate nor power is here given. To transmit the property, however, to the efficient assignees, an actual assignment is deemed necessary. With respect to the inrolment, it is probably intended by way of notice; but for this purpose it is defective, as no period is fixed; so that it may be made at any time during the lives of the parties; to the possible prejudice of any persons dealing with the property in the interim. Such as the provision is, however, it should, for consistency's sake, have

been extended to the appointment of provisional assignees, and to their assignments, as it is in the section next noticed.

The like vacillation, between *powers* to direct, and *estate* to be conveyed, appears in the 66th section, which regards the appointment of new assignees. The Lord Chancellor is to order any conveyance to provisional or efficient assignees to be vacated ; but his power does not extend further. The *commissioners*, who have no more estate than the court, are, *by its order*, to execute a new conveyance, which is to be valid without any conveyance from the former assignees, the order for vacating being inrolled.

Before animadverting upon the preceding provisions, it is fit to observe, that sect. 77 authorizes (on just principles) all beneficial powers vested in the bankrupt (except the nomination to a living) to be executed by the assignees. This might, however, have been carried a step further, by holding the commissioners' assignment (or, if the suggestion in the next passage be adopted, the choice of assignees) to be an execution of the power in favour of the assignees.

To proceed to a summary view of the objects and operation of the preceding sections: In principle, all transfers of the bankrupt's estate operate, not as conveyances, since the persons directed to make them have no estate in themselves, but as the execution of statutory powers. The period for

which the estate should be bound ought to be, and for most purposes is, the act of bankruptcy. To give direct and full effect to these positions, and correspondent ease and simplicity to titles, (which are now loaded by constructive appointment—actual assignment—revocation, or cesser of estate—and new assignment, acting successively, with confused operation, to an extent which, if exhibited in one view, would excite surprise,) the property should be declared to be bound, from the time of the act of bankruptcy, against all persons except the crown, its debtors, and accountants, to the extent of their actual debts, and purchasers from the bankrupt, where now protected. The mere choice, by the creditors, of the assignees, should vest the estate in them, by relation to that period. The like mere choice of new assignees should vest the estate in *them*, by relation to the death or removal of any former assignee. Partial precedents, for this uniform operation, are to be found among the regulations already noticed, especially those regarding provisional assignees and powers; and also in the Insolvent Debtors' Act, which will form our next chapter.

In the preceding observations I have felt warranted in being the more minute, as the present bankrupt act, though it embraces an extensive portion of our law, is not, nor indeed could it be, extensive in its relations to real property; and its recency presented a favourable occasion for ex-

hibiting the importance of method and simplicity in our legislative provisions.

Its enactments, however, with respect to the real property, are far from meriting general stricture. Under former acts, the commissioners' assignment was confined to whatever property was vested in the bankrupt at the time of the act of bankruptcy ; which rendered a new assignment necessary, upon his acquisition of any further property. This is cured by the 64th section, which extends the effect of the assignment to property acquired at any time before the certificate. Upon this it is observable, that the extending it to property *devised* will probably have a harsh effect towards the bankrupt, without producing any corresponding benefit to the creditors. The fourth section declares, that a conveyance or assignment by a trader to trustees, for the benefit of his creditors, shall not, under certain regulations, be deemed an act of bankruptcy (as it heretofore was), unless a commission issue within six months ; a wise provision in principle ; though, under this *prospective* validity, no execution of the trust can take place during the six months, which must frustrate its object. The better mode would have been, to give immediate validity and consequent activity to the trust ; but to render the trustees accountable for the produce to the assignees, if a commission should be issued within six months. The 81st section renders valid (as before, with some modification) conveyances to purchasers with-

out notice, if made two months before the commission issued. The 86th section gives validity to purchases, even with notice of an act of bankruptcy, unless a commission be sued out upon it within twelve months, instead of the former extensive period of five years.

No. 3. Of self-declared Insolvency.

In modern times, our legislature has introduced the *cessio bonorum* in favour of insolvents of every description, imprisoned for payment of money. After some temporary experiments, the laws on the subject were incorporated by 1 Geo. IV. c. 119, an act which, with a minuteness of detail almost peculiar to our modern laws, still takes a thorough, and, with a few exceptions, a correct view of its subject. As in bankruptcy, our view of it will be confined to its effects on the real property of the prisoner, petitioning under the 4th section of the act.

By this, and the 6th and 7th sections, the prisoner is required to execute a conveyance and assignment of all his real and personal estate to the provisional assignee of the court, established by the act; and to deliver in, within a limited time, a schedule of his property. The court is then to appoint assignees, to whom the provisional assignee is to execute an assignment; and they are to execute

any beneficial power vested in the prisoner, and to proceed to sale of any real estate, whether in possession or expectancy, within two months. By section 8, however, the court is authorized, for the prisoner's benefit, to stop or suspend the sale of any life-annuities or reversions, or other property of an uncertain nature; or to direct the debts to be raised by mortgage. Section 14 directs that, on the appointment of new assignees, the property of the prisoner, vested either in the provisional assignee, or in the old assignees, shall become vested in the new assignees. The principle of this last provision is good; but, to carry it to its full extent, the property should have been made to vest in a similar manner, on the appointments, first of the provisional assignee, and afterwards of the acting assignees; or, in the former instance, perhaps, (as the abuse of extents in aid, which alone could formerly have defeated the rights of general creditors, is now corrected,) by dispensing with provisional assignees, and causing the property to vest at once in the efficient assignees; leaving it, in the interval, under the protection of the court.

No. 4. Of Assets.

By *assets* are meant the property of a deceased debtor applicable to the discharge of his debts and legacies. These are essentially divisible into land

and moveables, or real and personal. The former has hitherto been my immediate subject ; but, in this instance, the two classes are not severable, any more than is the secondary charge of legacies in a will from the more important one of debts.

If there be any description of laws which peculiarly requires to be simple in its rules, and prompt in its execution, it is that for the discharge of the debts of a deceased. It forms an act of justice of the highest order. The creditor has lost his debtor : he is a stranger to the estate, and to those into whose hands it has fallen ; and that estate is about to be dispersed, without leaving any one *personally* answerable beyond its produce. How far this principle actually pervades our laws for the distribution of assets, will appear presently.

Passing the lien of the crown upon the estates, both real and personal, of its debtors and accountants, with the single remark, that they are equally available, and with the same priority, against their assets, when deceased, as when living, I shall proceed to the division of assets, which is of a twofold character ; *viz.*, into *real* and *personal*, in relation to the nature of the property, as has been already noticed ; and into the more technical one of *legal* or *equitable*, with respect to the courts and systems of jurisprudence by which they are administered.

At common law, debts to the subject were payable in the following order :—*First*, judgments

and other debts of record. *Secondly*, specialty debts, as upon bond, covenant, or other instrument under seal. *Thirdly*, simple contract debts. The appropriate fund for payment of these was the personal estate; but specialty creditors had, in addition, their remedy against the heir *personally*, to the extent of any lands descended to him in fee-simple. If the heir, however, aliened the assets before an action was brought, the creditor could not recover; as the heir might allege, in the technical language of pleading, that he *had* nothing by descent. But this was redressed by the 3 and 4 Wm. and Mary, c. 14. Again, after the statute of 32 Hen. VIII. the debtor might will his land, in which case the creditor was equally remediless, as the action lay only against the *heir*. But the above act of Wm. and Mary gave the action against the heir and devisee jointly. Trust-estates, too, which were cognizable only in Chancery, were held not to be assets in the hands of the heir; by analogy, as it was said, to the old law of uses, when cognizable only there. It might, indeed, have been reasonably expected, from the more general analogy which that court professed to establish between legal and equitable estates, and from the almost-legislative stretches it had often made to do substantial justice, that it would have held the heir answerable in respect of trust-estates descended, in the same manner as of legal; but it left this act of justice to be performed by the legislature, which it accordingly did by 29 Car. II.

c. 3. s. 10. Another remedy, of a more enlarged character, has been given in modern times, by 47 Geo. III. sess. 2. c. 74, which renders the lands of traders within the bankrupt laws assets, on their deaths, for payment of their debts by simple contract, as well as by specialty, but reserving to specialty creditors their former priority.

The imperfections and inequalities, however, which pervaded the *legal* system of the liability of assets, as it originally stood, occasioned the early interference of equity, which, as usual, has ingrafted a more extensive and equal distribution at the expense of simplicity. In order to enlarge the funds, it has *marshalled* or classed the assets. In order to equalize their distribution, it has created the distinction of *legal* and *equitable* assets. Of these, each in its order.

The rule in equity is, that the assets shall be so arranged, as to satisfy, as far as practicable, the claimants of every description. With this view, if a specialty creditor, who has a lien on the real assets, receive his debt out of the personal estate, equity will place a simple contract creditor in his place against the realty, so far as the former may have exhausted the personalty. The same character of relief is also given to a legatee; as, where lands are subjected by a testator to all his debts, but not to his legacies, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal estate, when he

might have resorted to the real. But the latter case was soon found to require some qualifications. A pecuniary legatee and a devisee of lands were equal claimants under the testator's bounty; but one claimant ought not to disappoint another. Though a legatee, therefore, may stand in the place of a specialty creditor, as against lands *descended*; yet he shall not as against lands *devised*. On the other hand, although it be a rule, (as will appear hereafter,) that a mortgage shall be primarily paid out of the personal assets, as being a personal debt, and not out of the mortgaged estate, yet equity will not allow this application of assets to take place to the defeating of a pecuniary legacy; but will place the legatee in the place of the mortgagee; or, in other words, will confine the latter to the land, even though the estate be particularly devised. Upon a similar principle, although a contract for an estate renders the purchase-money a debt payable out of the personalty, in favour of the heir, yet equity will not allow him to resort to it, to the disappointment of a pecuniary legatee. These are among the refinements, rendering its rules a mass of individual cases, to which equity has been driven, to enforce a principle which should be moulded into one simple, undeviating law.

Besides *legal* assets, which are distributable with such priorities as already noticed, there are others which can be reached only through the aid of

equity, and are therefore called, *equitable* assets. These, agreeably to the maxim that equality is equity, are distributable equally among all the creditors of every description. The distinctions between legal and equitable assets are necessarily technical, arising out of the peculiar jurisdiction of equity. If lands be devised to be sold for payment of debts ; or, as the modern opinion is, are charged with the payment of debts, then, as the remedy is not at law, but under the disposition, which is enforceable to any effect in equity only, they are deemed equitable assets. On the other hand, the circumstance of an estate being cognizable in equity only, does not always render it equitable assets. Thus, a trust-estate is legal assets *in the hands of the heir*, it being made assets by statute, which always intends the common law. An equity of redemption of a mortgage has assumed a more complicated character. When trust-estates were rendered assets by statute, an equity of redemption of a mortgage in fee, though not assets before, was by analogy held so also ; but, as it merely acquired this quality from equitable adjudication, it was deemed equitable assets. Being real estate, however, it forms assets only to pay such debts as real estate is liable to. An equity of redemption of a *leasehold* estate is also considered equitable assets. Where one seised in fee, however, mortgages for a term of years, as is frequently done, the equity of redemption is assets *at law* ; because

the reversion, which attracts the redemption, being assets at law, the equity of redemption should be of the same character. Thus in one single species of interest, namely an equity of redemption, we have three characters of assets :—equitable assets *qualified*—equitable assets *absolute*—and *legal* assets.

In the distribution of assets, the common law regarded only the creditor. Indeed, before lands were devisable, there was no occasion for interference between the different classes of representatives ; the rule, though harsh, being simple. The statute of devises, however, and the extension in equity of the remedies to the creditors, with the intricate rules for effecting it, has obliged this jurisdiction to regulate the order of contribution between the different claimants, by gift or legal transmission, under the deceased. Hence the distinction between primary and secondary funds. The personal estate is the primary fund for payment of debts ; but, *as between the real and personal representatives*, the personal estate may be exempted, either by express words, giving it so discharged, or by rendering the real estate, or a part of it, the sole fund. When the personalty is either exhausted or exempted, the real estate, whether forming legal or equitable assets, is applicable in the following order :—First, estates expressly devised, or otherwise appropriated, for that purpose : Secondly, (to the extent of specialty debts), real estates descended ; Thirdly, real estates devised,

subject to a general charge of debts ; and Lastly, (to the above limited extent only) real estate devised, but not so charged. Where two funds are primarily charged, and are disposed of, subject to the charge, in a manner which is ineffectual as to one of the funds, as real and personal estate to a charity, which, as to the former, is void under the mortmain act, equity, in order to enforce the valid part of the disposition, will apportion the charge between the two funds.

In one distinguished instance, that of mortgages, (which has been already alluded to, in speaking of the marshalling of assets in favour of legatees,) it often becomes a question, when, and to what extent, they are the personal debt of the deceased owner of the estate. They are so, when made by himself ; but, if an estate be bought, subject to the mortgage, then it forms the primary fund ; unless, by some unequivocal act, he has rendered the debt his own. A mere covenant, however, with the vendor will not have this effect ; and the personal liability depends, in such case, upon the vicious criterion of its own individual circumstances. When the mortgage is a personal debt, it carries all the consequences of one. Thus, lands, charged with, or devised for, the payment of debts, are liable to exonerate such mortgaged lands, whether devised, (and that even expressly subject to the incumbrance,) or merely descended. So, lands descended shall exonerate mortgaged lands devised. Again, unincumbered lands, and mortgaged lands,

both being specifically devised, but expressly after payment of *all* debts, shall contribute to the discharge of the mortgage. Throughout all these cases the principle appears, that the mortgage is the testator's personal debt, and shall be discharged accordingly out of the funds provided, either by the law, or by the testator, for that purpose ; without regard to the security or pledge of the real estate. It has, however, been shewn, that equity will not allow a mortgage debt to be paid out of the personal assets, to the disappointment of a legatee.

Such are the leading rules for the administration of assets in equity, within whose jurisdiction they are now principally drawn. Their twofold objects, of rendering, by means of marshalling, real property assets for payment of simple contract debts, and of an equal distribution between creditors of every description, were not only consistent with natural justice, but liberal to a degree which, had their political effects undergone discussion on their first introduction, would have not only alarmed the prejudices of feudal landowners, but even startled the very framers of the rules. The circuitous means adopted, however, (to some extent unavoidably,) for effecting these purposes, have introduced a discordant and most complicated body of laws. First, we have the harsh, though simple, rule of common law. Then comes equity ; not subverting, but undermining it, in changing the character of creditors from simple contract to specialty, by

marshalling the assets. Her next step is bolder :— Framing a new description of assets, under the title of *equitable*, and administering these, not according to the rule, (always professed, though seldom respected,) that equity follows the law, but after a new system of perfect equality, both as to persons and property. These assets, however, necessarily require to be administered in conjunction with legal ones. Indeed the distinction being purely technical, the two characters may pervade the same property. Equity, too, is obliged to bend itself, sometimes to the law, sometimes to the legislature ; as, in equities of redemption of mortgages in fee, and in trust estates. It, however, generally rights itself and its rule, by giving a new direction to some other property, over which it may have a more absolute jurisdiction.

But, in effecting these objects, what accounts—what classification—what apportionments—what assemblages of parties and property into one general mass of litigation—what direction and superintendence become necessary ! To such an extent indeed, that a large proportion of the assets of the country are now administered under the direction of the Court of Chancery. The only adequate cure consists in one simple set of rules for the administration of assets of every description. The principle which should pervade it is, that of equal distribution. It is sanctioned both by natural justice, and the long-established practice of courts of equity.

Sect. 9. *Of Alienation by Adverse Possession ;
or, Limitation of Time.*

The ancient law, in the recovery of rights, viewed the seisin as transmitted from the ancestor to the heir, either in fee simple or in tail ; testamentary disposition being then unknown. Its remedies were various and intricate, but all savouring of the notion of *disseisin* or ouster, which prevailed in the feudal system, originally grounded on fact ; but afterwards, (and indeed in this country from its first introduction,) subsisting merely, as has been already observed, in legal fiction. These remedies bore the general name of *real* actions, which were divided into *possessory*, being grounded upon a right to the possession, as a writ of entry, an assize of *mort d'ancestor*, or of *novel disseisin* ; and *droitural*, being grounded upon the mere or absolute right ; as a writ of right by one entitled to the fee simple ; writs of formedon, in descender, remainder, and reverter ; the first for tenants in tail, and the two latter for those entitled in remainder or reversion, after failure of the estate tail.

At common law, rights were not barred by any, even the longest lapse of time. The expediency, however, of *some* limitation was early felt. For this purpose various statutes were passed, fixing

express periods within which the seisin, whereon the claim was grounded, must be proved ; as, from the times of Hen. I. and Rich. I., successively ; but which, in the course of time, became scarcely any limitation at all. The statute of 32 Hen. VIII. c. 9. first prescribed periods having reference to the commencement of the claimant's title. By this act all *writs of right* for lands, &c., on the seisin of the claimant's ancestor, were limited to sixty years. This was an action of the highest nature, grounded, as already stated, on the mere right to the fee simple, after the right of entry had been lost.

The *formedon*, which lay for tenants in tail, and those entitled in remainder and reversion, was a writ of right of an inferior character ; and was limited by Sect. 5 of the same statute, to fifty years.

Next came *possessory* actions, grounded upon the claimant's *right of entry*, either in respect of his original seisin, or as heir : of the former class was the writ of intrusion ; as, where the claimant had demised to one for life, and, after the lessee's death, a stranger had *intruded* himself into the possession. The remedy in this and similar cases, seems to have been limited, by Sect. 3, of the above statute, to thirty years. Of the latter class was the same writ, where the right first accrued, not to the grantor himself, but to his heir. Of this character also was the writ of *abatement*, which lay, where a stranger, by entering on the death of the

ancestor, *abated*, or prevented the descent to the heir. All actions of these and similar descriptions were limited by Sect. 2, of the above statute to fifty years; and *that*, according to a recent judicial opinion in chancery(*a*), grounded upon the words of the act, is accounted, in the case of an intrusion after an estate for life, not from the time the claimant's title commenced, but from the prior seisin of the ancestor, by taking the *esplees* (as they are called) or profits; so that, if the interest of a tenant for life subsisted more than fifty years, this remedy was lost!

The foregoing and similar remedies regarded the land itself; but it was charged, under the feudal system, with various rents and duties. Of these there could be no actual ouster; but merely a withholding. For this reason probably the statute made no distinction between the original owner and his heir; but Sect. 4, limited every claimant, who should "allege any seisin of any rent, suit, or service,—in the possession of his ancestors, or predecessors, or in his own possession, or—of any other," to fifty years.

After further experience, and as civilization, and with it, the power and promptitude of the law, advanced, the different periods allowed for enforcing rights were found, in many instances, to be still too extensive. This occasioned the statute of 21 Jac. I. c. 16. By the first section of this act, all writs of

(a) 1 Jac. and Walk. 532.

formedon, in descender, remainder, and reverter, are limited to twenty years after the title and cause of action first accrued. Sect. 4. excludes all persons from making entry into any lands, &c., unless within twenty years next after their title should first descend or accrue. This last enactment has indirectly fixed the modern limitation to the recovery of lands, in most instances, though not in all. The manner requires explanation.

The various real actions already stated being found intricate, tedious, and expensive, and such of them as depended upon a right of entry, as well as the action of *formedon*, being limited, by means of the last statute to twenty years, the writ of *ejectment* was substituted for them. It was in itself a series of legal fictions, of rather a violent character; but these, once conceded, resolved themselves into mere legal forms. The action proceeded upon a supposed right of entry, for an imaginary term of years. But all rights of entry are confined to twenty years. Consequently, no *ejectment* can be brought after that period, computing from the time the title accrued; unless in the cases of infants, married women, persons of unsound mind, imprisoned, or beyond the seas; all of whom, and their heirs, are allowed ten years after removal of their respective disabilities, or their deaths, for enforcing their claims. This period, however, runs only from the cessor of the first disability; so that an *infant* heir of a person dying under legal dis-

ability shall not have any new indulgence. As the time, however, begins to run from the commencement of the claimant's title in possession, he is not bound to assert his claim during the continuance of a lease. While that subsists, he cannot lawfully enter. It may be here observed that, as a devisee has merely a right of entry, and cannot, according to any of the rules of real actions, count upon the seisin of his testator, his only remedy is by ejectment.

This writ, however, lies only for *land*, or visible property, and not for an advowson, a rent, or other incorporeal hereditament; except for tithes, under 32 Hen. VIII., and subsequent decisions upon it. Nor will it lie where the right of entry is *toll'd*, i. e., taken away, as under our laws of tenure it is, by a descent to the heir of the disseisor under certain qualifications; or by a discontinuance, which means an unauthorized alienation by the tenant in tail, or by other means too remote from practice to need enumerating. In each of these several cases, as in some others, recourse must still be had to a real action; the suitableness of which, the mode of proceeding in it, and the bar applicable under the statutes of limitation severally form topics of lamentable uncertainty, obscurity, expense; and delay, whenever an unfortunate claimant is so ill-advised as to awaken these sleeping dragons of the law(a).

(a) See 6 Taunt. 263. 1 Jac. and Walk. 532 and references.

That such excessive technicalities tend to merge the end in the means, and to confound in the practitioner all sense of natural right, cannot be better illustrated than by the following short extract from an accurate, and, in his day, highly respectable writer on *real actions*. Speaking of formedons, he says—"I shall here give—some light, how long these actions may be regularly delayed before any judgment can be given in them; *which is much for the advantage of the tenant, who ordinarily desires to keep the possession as long as he can.*" And he accordingly keeps his word; stating, as the extreme result, "but if there be many tenants and vouchers to be vouched over, *it makes the delay as long as the parties live, though the suit continue many years*" (a).

It was, at one time, a question whether *equitable* or *trust-estates* were within the statutes of limitation; but it has been recently determined that they are equally so with legal ones, twenty years being considered the general bar.

A bar of an anomalous description, and of singular brevity, exists as to freeholds, though not as to copyholds, under the effect given by 4 Hen. VII., to a fine levied with proclamations. That statute bars the rights, not only of parties and privies, but also of strangers, having present interests, and not being under legal disability, unless they claim within *five* years after the proclamations made; the making of which occupies a previous year. The publicity

given by the proclamations, which the statute in question directed to be made, for three successive terms, in open court, occasioned the legislature to annex to a fine so levied the effect of the above speedy bar. Times, however, have changed ; and the public are comparatively strangers to the mere formal proceedings of a court of justice, where unattended by any actual discussion.

The several foregoing bars extend to all individuals, and also to all corporations, except two descriptions—the crown and ecclesiastical bodies. By 9 Geo. III. c. 16, all rights of action in the crown are limited to sixty years. It is not, however, affected by the statute of fines ; nor, consequently, by nonclaim on fines with proclamations. Ecclesiastical bodies are not affected by any of the statutes of limitation, nor by that of fines ; but their rights are unprejudiced by even the remotest lapse of time.

On perusing the preceding sketch, the reader must be struck with the obliquity of operation by which our present law produces the ordinary bar of twenty years. But, passing the mode, and supposing the period a suitable one, it is very far from being general. It is exceeded in the instance of an heir, who may enforce his claim, where grounded on the mere right of his ancestor, at any time within sixty years, while a devisee is confined to twenty ; so, also, where the remedy of the claimant is not

grounded upon his right of entry, but rests, though with forlorn chance of success, upon either the mere right of himself, or the possessory title of his ancestor, in which cases the periods of limitation seem to be, in some cases thirty, and in others fifty years; and again, in the instance of incorporeal hereditaments which, not requiring an entry, may recovered at any time within fifty years, with the exception of advowsons and tithes, which are not subject to any limitation. On the other hand, the period of six years, at the end of which all present rights may be concluded, by means of a fine with proclamations, is brief beyond all analogy and reason; and is confined, capriciously in principle, to *freeholds*, leaving the inferior tenure of copyhold unaffected by it.

With respect to the two excepted descriptions of corporations, it is fit that some extraordinary protection should be thrown around bodies so peculiarly circumstanced; but it surely is not too much to propose—that ecclesiastical bodies should be restrained to the same limits as the crown.

It may be here observed, that the present law of entails forms a great impediment to any uniform limitation of time; since, although one line of heirs in tail may be barred by adverse possession, yet, on its failure, a second has a new and similar period within which to make its claim; and so in succession, as long as the different limitations endure, which may possibly be for a century or more.

Sect. 10. *Of Acquisition; first by Escheat, either from a Failure, or a Corruption of inheritable Blood; and next by Forfeiture.*

The property of a tenant of a *legal* estate, in fee-simple, reverts, under the doctrine of tenures, to the lord of the fee, on failure of inheritable heirs of the tenant, or from corruption of his blood, by attainder for felony—*vel propter defectum sanguinis, aut delictum tenantis.*

In the former case, such escheat takes place where the tenant's title is by descent, on failure of the line in which such descent has occurred, whether paternal or maternal, without regard to the other line. Where, however, the title is by *purchase* (which technically means any other mode than descent), the descent takes place, first in the paternal line, and failing that, in the maternal line. To this, however, there is a single exception of a brother or other kinsman of the half-blood, who is totally precluded from taking, as heir, even land acquired by purchase; on an artificial reasoning, from feudal principles, already noticed in the chapter on descents.

Escheats for felony, or *propter delictum*, are governed by the same rules as those for want of heirs, or *propter defectum*; with this addition, that they obstruct not only the transmission of the felon's

property to his heir, but also the descent of lands to his posterity through him, when they are obliged to derive their title by his medium from any remoter ancestor; as the son of an attainted father claiming the estate of his grandfather. This effect, however, is humanely prevented in most of the modern statutes creating new felonies.

The doctrine of escheat, either *propter defectum*, or *propter delictum*, as it originates in tenure, does not apply to estates held by a trustee; since *he*, and not the beneficial owner, is the tenant to the lord. As the class of persons, however, for whom such trust was created, has, in a legal sense, failed, the lands remain in the trustee for his own benefit, to the exclusion not merely of the lord, as representing the original grantor, but also of any uninheritable kindred, where existing, and of the state, as the common heir; though the legal claim of the latter might have been originally urged with great force, on fiscal grounds. On the other hand, it is held, with equal violence to natural equity, and to the disherison of the real owner, (though certainly to be defended on the theory of tenures), that, where a trustee dies without an heir, the lord, taking by escheat, is not liable to the trust.

By attainder for high treason, the offender forfeits to the king all the fee-simple lands which he was seised of at the time of the treason committed, whether in his own legal seisin, or in that of a trustee for him. This latter effect is produced, by

reason that the forfeiture is grounded, not on feudal, but on political rights. By two statutes of Hen. VIII. this forfeiture is extended to estates tail of which the offender was actually seised at the time of the treason ; but it does not affect the estates in remainder. The treason works corruption of blood to the impediment of all descent through the offender. He also forfeits the profits of all lands held by him at the commission of the treason, either for life or years.

The king has the further privilege of possessing for a year and a day, and laying waste the lands of persons attainted of petit treason and felony. This, however, in the humane spirit of the present times, is either compounded for ; or, in smaller instances, passed over.

TITLE V.

OF COPYHOLDS.

IN treating of tenures, that of copyhold has been reserved, as forming a totally distinct system, for separate consideration ; but it will be disposed of in a much more succinct manner than have been freeholds, with their incidents ; since it is, in itself, incapable of amelioration ; and, would it admit of any, still it forms a superfluous system of property.

CHAP. I.—*Of the Origin and general Properties of Copyhold.*

Unlike freeholds, which, in their general character, consisted of lands granted out, under fixed military or other honourable services, but which may also consist of burdens on land, as rents, tithes, &c., copyholds, in their origin, are confined to lands which the lords of manors granted out of their demesnes to their villeins or slaves, on performing certain inferior services, generally of an agricultural nature, sometimes of a baser kind ; but ever determinable at the sole will of the lords. By long acquiescence, however, and the increased humanity

of the times, these ripened into custom ; the personal services were mostly commuted for money, under the name of quit-rents (*i. e.* acquittance-rents); and courts of law gradually interfered to protect the tenant in his possession, in the manner established by usage, on paying and performing the accustomed rents and services.

The terms, however, of this tenure, were necessarily as various as accident or the caprice of the lord could make them ; nor were they controlled by any analogy to the common law, unless where the custom was silent. In many manors, the copyhold was permitted to descend to the heir of the tenant. In others, (and these prevail more generally in the west of England, and where the land is holden of the church,) the custom has limited the tenure to the life of the tenant, or of his nominee (called *cœstui que vie*), on the determination of which it is at the lord's option to renew the grant or not. As copyholds of inheritance, however, form by far the larger proportion, and the legal incidents to them are much more numerous, these will be always considered as intended, where not otherwise expressed. In both cases the tenure is still confined to land, and it is of its essence, that it should have been *demised*, or *demiseable*, by copy of court roll, immemorially. Under the latter words of this alternative, aided by a special custom, modern grants by copy of court roll, of the waste of a manor, have been supported, on the ground that, though

not actually so demised, still it has ever been demiseable, the waste being, till so granted, parcel of the demesnes of the manor. The terms of copyhold grants are, "*to hold at the will of the lord, according to the custom of the manor*;" the former indicating the original condition, and the latter the usage established by length of time. The property is called copyhold, because the grant, and the consequent admittance, are entered on the rolls of the manor; and copies of them, signed by the steward, are given to the tenant; and form his sole title.

With respect to the more peculiar properties of copyhold, I shall enumerate the chief of them generally, and then dilate upon some of the principal ones. Their descendible quality has been already noticed. Copyholds also carry, by the special customs of most manors, though not of common right, the incidents of curtesy and dower, which of course vary with these customs. They are alienable, *inter vivos*, by the mode of surrender and admittance. They are devisable by the indirect means of a surrender to the use of the tenant's will, (which operates as a declaration of such use,) and the consequent admittance of the devisee. That surrender, however, is now reduced to a legal fiction, as noticed elsewhere. In any of these dispositions, the tenant may either give his whole estate, or he may modify it into partial interests; as an estate in tail (if the custom admit of entails), or for life. All complicated modifications, however, as provisions for

wives and children, are better effected by means of trusts, as will be noticed hereafter. The tenant may also mortgage, by means of a conditional surrender ; to be void on payment of the loan with interest. He may lease for a single year, by the general custom of manors ; but, to grant for a longer term, the license of the lord is necessary—and, as this proceeds from *his* authority, by a necessary refinement, it is held to flow out of *his* interest ; and not from that of the tenant. By the general custom, the copyholder cannot fell timber, except for repairs, nor work mines ; as these are part of the freehold, which belongs to the lord. The latter, on the other hand, cannot enter on the tenant's possession to take them ; so that, for enjoying these rights, their natural concurrence is necessary, unless the special custom has settled it otherwise. On the principle, that the lord, unless controuled by the custom, cannot have a tenant imposed upon him without his consent, copyholds are not extendible for debt, either by the crown, or by an individual ; nor, for the same technical reason, are they assets, *by law*, though capable of being made so, for the payment either of debts or legacies. They escheat to the lord, for default of heirs ; or become forfeited to him, on the commission of treason or felony, or for various acts in derogation of the tenancy ; as, aliening by a conveyance at common law, refusal to pay the lord's fine, or quit-rent, or to perform

his services, or committing waste, &c. Not possessing any freehold quality, they cannot confer the elective franchise.

The only mode of transferring a copyhold is, by surrendering it into the hands of the lord, *to the use* of the nominee in the surrender, or of the tenant's last will. Under this surrender the lord admits the nominee or the devisee; who then becomes the copyholder. Such a declaration of the intent, however, does not place copyholds within the statute of uses; but, till admittance, the surrenderor or his heir, remains the tenant; a qualified interest which is attended with many fine-spun legal consequences. Copyholds are, however, the subject of trusts; and equity exercises over them an extensive jurisdiction, (which will be noticed wherever the occasion requires it,) in addition to, and occasionally in derogation of, their *legal* properties.

Such is the outline of the *copyholder's* estate. The *lord's* interest consists *essentially* of fines, on every death, and alienation, or other change of tenant; and occasionally of heriots. The further consideration, however, of these will be postponed; in order not to infringe upon the more minute view which I now propose to take of those leading incidents to the tenant's estate, accession by act of law, as descents, curtesy, dower; and by act of the party, as surrenders and admittance *inter vivos*, and wills.

CHAP. II.—*Of Transmission by Act of Law.*

I have already adverted to the descendible quality of most copyholds. This descent, however is regulated by the special custom of each manor. In some, the course of the common law, namely primogeniture among the males, is adopted.—In others, that of *gavelkind*, where all the males take equally.—In a third description, that of *borough English*, where the descent is to the youngest son. Or, the mode of descent may vary in the same manor, according to the value of the copyhold ; so that the descent is at common law, where the tenement is worth 5*l.* per annum, or upwards, and in *gavelkind*, where under that sum. But, wherever the customary descent deviates from that at common law, it prevails only in the instances established by the custom ; so that a descent to the youngest son, or between all the sons, will not, *of itself*, support similar descents in the instance of collaterals ; but, where the custom is mute, the course at common law prevails. The customary descents in *gavelkind*, and *borough English*, being generally known, are recognised by the law, on their bare mention ; but mere local customs must be specially stated. The heir's title is not complete till admittance ; but, in the interim, he may take the profits, and make a lease agree-

ably to the custom, or he may maintain an ejectment.

It may be here noticed that, in dealing with trusts, equity has introduced further distinctions on the subject of descents. Where the trust is *executed*; (as it is termed,) or merely formal, as of gavelkind land for one and his heirs, there the customary descent prevails; so of an equity of redemption; but, where the trust is *executory*, or requires some act to be done by the trustee, or by the court; as, under marriage articles, to settle *gavelkind* lands on the husband and the heirs of his body, equity will settle it on the eldest son, and the heirs of his body, with remainder to the second son, and the heirs of his body; and not equally in all the sons. So, in the case of a trust of borough-English land for the right heirs of one who took no previous estate, equity holds it a trust for the heir at common law. In these and similar cases, it deems the subject within its peculiar jurisdiction, which it professes to administer, after the common law. It might have been urged, however, that, in these instances, *the custom* is the law.

The rights of curtesy and dower, namely, the interest of the surviving spouse in the copyhold estate of the deceased spouse, form our next legal incidents. They do not attach by the general law of copyholds, or as of course; but only occasionally, by the special customs of some manors. With respect to curtesy, these sometimes give it, al-

though there be no issue of the marriage; and sometimes confine the husband to a moiety, or to the period of his remaining a widower. Dower, (or freebench, as it is termed, from the widow being entitled to take her place on the bench of homagers,) consists sometimes of a moiety, sometimes of a third of the copyhold. It endures more frequently for life; but occasionally during widowhood, or continency only. It is generally confined to estates of which the husband *dies* seised; so that he may defeat it, by aliening in his lifetime, or even by his will; because testamentary disposition is effected, (as has been already observed,) by his surrender to the use of it, to which the will has relation. By the custom of some manors, admittance is necessary, by that of others not, to complete titles of tenants by the curtesy, and in dower.

In customary curtesy and dower, equity observes the same rules as in inheritances at common law; allowing curtesy to take effect in trust-estates of copyholds; but refusing it in the instance of dower.

CHAP. III.—*Of Transmission by Act of the Party.*

Copyholds are generally conveyed, as has been already observed, by the tenant surrendering them in court by a written instrument into the hands of

the lord, or his steward, or deputy, to the uses directed by it, for a purchaser or a mortgagee, or trustees of a settlement, or on any other transaction *inter vivos*. This surrender, when made, is entered on the rolls. Since the act of 55 Geo. III., hereafter noticed, an actual surrender is unnecessary for the purpose of devising; but that statute still proceeds upon the presumption of one. The lord, on all these occasions, is the mere instrument to admit the parties, either specified in the surrender, or to be designated in the will, when made. In the interim, the estate remains in the surrenderor, and his heirs; but defeasible by the right of the surrenderee or devisee to be admitted, agreeably to the surrender or will. Till then he possesses no legal rights, though he may devise his *equitable* interest. On admittance, however, his intermediate acts, and the rights of his heir and widow, will acquire validity, by relation to the surrender.

Sometimes the surrender is made out of court, either to the lord, or the steward; or else to a deputy or special steward; or, by special custom to the bailiff, or to two tenants of the manor. In all, except the two first instances, it is necessary that the surrender be presented, and enrolled. This, by the general custom of manors, should be done at the next court; though by special custom, it may be done at a subsequent one.

The admittance may be made either in or out of court; but, in the latter case, a memorandum of it

should be entered on the rolls. The tenant's title being thus complete, he should take, as evidence of it, copies of the surrender and admittance, from the rolls.

Such are the outlines of this circuitous mode of transfer. Numerous questions and distinctions, however, of a pure technical character, have arisen, and still subsist, upon its different stages—such as, 1, who may make a surrender or not, in respect of their personal capacities, as husbands and wives ;—2, or of their interests, as estates in remainder, or in contingency ;—3, its construction ;—4, what acts the surrenderee may or may not do, before admittance ; 5, what relation the admittance shall have to the surrender ;—6, what interest shall remain in the surrenderor in the interim ;—7, what description of interests require admittance, and what not ; as those of heirs, tenants by the curtesy, or in dower, remainder-men, reversioners, donees of a power, surviving jointenants, &c. ;—8, what amounts to an admittance ;—9, the effect of a wrongful admittance ; with many more.

As copyholds may by custom be entailed, it is a right inherent to the tenant, in order to prevent perpetuities, that he may bar the estate tail, and the remainders over. The mode of effecting this depends also upon custom. Where no special custom exists, it may, by the general custom of manors, be done by surrender. The special customs of most manors, however, authorize the suf-

fering a common recovery in the lord's court ; by analogy to the similar right at common law over entailed freeholds. For this purpose, a similar fictitious suit takes place in the lord's court ; commencing with a surrender to, and admittance of, a tenant to the plaint ; against whom the supposed suit is brought by the demandant ; and the usual fictions of appearance, vouchers to warranty, imparlance, default, judgment, &c., are gone through ; with this variation, that, instead of the recoveror standing seised to the use of the owner, (which in freeholds transfers the legal estate to the latter, through the statute of uses,) the recoveror is admitted, and then surrenders to the use of the owner, who is finally re-admitted ; making, in the whole, three successive admittances, while the owner remains the same ! It may be noticed, that customs to bar entails by recovery, and by surrender, may be concurrent. And, finally, custom, occasionally, though rarely, authorizes entails to be barred by forfeiture and regrant.

Where the entail is of a trust, it may be barred by the acceptance of the legal estate from the trustee. This may be also effected by the recovery of the equitable tenant in tail ; but, if the lord will not permit him to implead, as not being his tenant, and the concurrence of the trustee cannot be obtained, then the better opinion is, that the bar may be effected by deed.

For the technical reason already noticed, that the

lord may choose his tenant, (which here, as in other legal fictions, in course of time, deviates from the fact,) copyholds are not within the statute of wills; but devises of them were effected through the medium of a surrender to the use of the tenant's last will; the devisee under which, became the nominee of the use, and was admitted accordingly. This mode of disposition, however, was frequently frustrated, by the tenants omitting to make such surrender, or afterwards revoking it by some inconsistent act; and equity relieved, as in the instance of powers, in the favoured cases only of wives, children, and creditors. The frequency of unredressed mischief occasioned the interference of the legislature, which, by the act of 55 Geo. III. c. 192, superseded the necessity of surrenders to the use of wills; but proceeds upon the presumption of their having been actually made, and preserves to the lord and the steward their respective fines and fees. This was certainly a most salutary law, both in giving effect to the intention, and in extinguishing a mass of equitable jurisprudence founded upon the want of surrenders to the use of wills. It also, with due justice, preserved the existing rights of the lord and his steward, and was well conceived with a view to consistency with the remaining parts of the system; but, what ideal machinery, what presumptions are ever necessary to give operation to laws framed not on general principles, but to suit the various anomalies of a capricious tenure!

As copyholds are not within the statute of wills, they consequently are not affected by that of frauds, as it requires wills of land to be attested by three witnesses, with other solemnities. Devises of them, therefore, do not intrinsically require any witness or solemnity ; and the recent statute, already alluded to, has prevented their being required by the terms of any surrender. In the second part of this essay an important result will be drawn from the absence of any such requisite.

Copyholds are within the different statutes for limitations of time already noticed ; except that they are not affected by the summary bar, at the end of six years, of a fine with proclamations, as this can only be levied of freeholds. In a writ of right, the plaint must be brought in the lord's court, but it may be removed into the courts at common law. An ejectment may, however, be brought for them at common law. These incidents furnish new distinctions on a subject which needed no addition to its oblique and complicated action.

CHAP. IV.—*Of the Rights of the Lord.*

SUCH is an outline of the *copyholder's* rights. Next follow those of the *lord*. In an early part of this essay, I treated the latter as *servitudes*, or burdens on the land ; and this view of the subject should be kept in mind, for the practical purpose to which I propose to apply it.

Passing by the nominal dues of fealty, homage, and services in kind, the substantial rights of the lord consist in *quit-rents*, *finer*, and occasionally *heriots*. The first of these is usually of small amount, having been fixed at periods when specie was of much greater value than at the present day.

The lord's principal profit consists in his *finer*. The occasions on which these are payable, and their amount, form two distinct heads of inquiry. They are governed by the customs of each manor ; and, where these are silent, by certain general rules. Finer are usually due on every change of tenant, either by death, alienation, or otherwise ; and are payable by the new tenant, as the heir, or the purchaser, on his admittance. Where a person takes in continuation of the estate of a former partial tenant, as a remainder-man, after the death of a tenant for life, or as an incident to the prior estate, as tenant by the curtesy, or in dower, the text writers have said, that no new fine shall be paid ; but a special custom for payment of a fine, in such cases, is good ; and it is also frequent, and countenanced in practice. So it has been determined that, where a surrender, or a devise under it, is to the use of jointenants, although they take but one estate, which survives, on the death of either, to his companion, without any new admittance ; yet, as the lord has two lives imposed on him, instead of one, he shall take a fine, and a half fine. Indeed, from these instances, and from the adjudged liability of the executors of a copyholder for a term

of years to the payment of a fine, it seems to be settling into a rule, that the lord shall receive a fine *on every change of tenant*, and not merely of estate. Other cases there are, where a statutory conveyance is deemed equivalent to a surrender; as a bargain and sale by commissioners of bankrupts, and by the assignees of insolvent debtors; under which the bargainee is admitted, and pays a fine. Again, as a common recovery, though a mere fictitious process to bar an estate tail, yet involves a necessity for—the surrender to and the admittance of the tenant—the recovery and admittance of the demandant—and his surrender to and admittance of the owner, one fine at least is payable. The dry technical rule, indeed, might warrant a greater number. Where a copyholder possesses lands, held by distinct copies, under several services, the fine must be assessed separately for each tenement; nor *can* these be reunited into one tenure, so paramount here is custom!

In respect to its *amount*, and in this consists the lord's chief profit, a fine is either *certain* or *arbitrary*. When *certain*, it must appear by the court rolls to have been invariably the same. In these cases it is of small, frequently nominal, amount. Even where fluctuating, however, and consequently *arbitrary*, courts of law interfered to prevent lords from taking excessive fines. They finally fixed the *maximum* at two years' improved value of the land at the time of the admittance, excepting only

the quit-rent. The land-tax did not then exist. But this rule is not universal: it does not prevail where a fine is due on a purchase only, and not on a descent; nor, of course, where the lord is not compellable to regrant; as on renewal of copyholds for lives.

The lord's other right, where it exists, but which is not universally the case, is that of *heriot*. It consists of the best beast of the tenant, or, in default thereof, the best chattel; such as a jewel or piece of plate. In some manors, it is confined to the best chattel. It is generally due on the death of the tenant, whether in fee or for life; sometimes, on his alienation also. Where several persons are admitted as tenants in common, the heriot is multiplied. So, where it is aliened in parcels. Nor are these hydras susceptible of diminution by any subsequent reunion of the property. On all these occasions, the lord may seize the heriot, wherever it is to be found.

The bare description of this right is sufficient to show its odiousness. But stratagem necessarily follows injustice. It is now a practice, in manors where heriots are numerous (as where copyholds are divided into small tenements), and are rigorously exacted, to appoint some person domiciled in Scotland the trustee on the rolls.

CHAP. V.—*Of the Extinguishment of Copyholds.*

This may be effected either by the tenant releasing to the lord ; or, which is by much the more frequent occurrence, by the lord releasing his seignory and services to the copyholder ; who thereby acquires the freehold, and ceases any longer to hold of the manor. Each of these two modes is voluntary, and assumes, that both the lord and the tenant are respectively entitled in fee ; or that the former, if only tenant for life under some settlement or will, or his trustee, has a special power to enfranchise. Another most salutary mode, and well worthy of general imitation, is, where power is given by inclosure acts to commissioners, to enfranchise the copyholds within their district, at the instance of the lord and tenant in possession. Here no regard need be paid, either to the quantum of their estates, or to their titles.

In the preceding system of copyholds, retaining, in the nineteenth century, constant traces of its primitive *villainage*, three classes are concerned : the copyholder (who owns the soil), the lord, and the public. Of these, *the first* has a property, governed by a peculiar and complicated body of laws, embarrassed with expensive forms, which keep multiplying with each successive division of the tenure ; affected by a different title, and often

by a different mode of descent, from any freehold property with which it is held; frequently exposing the copyholder's personal estate to an offensive seignorage, in the shape of heriots; and, above all, incapable of improvement, unless on the unthrifty and galling terms of effecting it for the lord's benefit as well as his own. *The lord's* gain is far from commensurate to his tenant's loss. His only material benefits are his fine, and (where it exists,) his heriot. Both yielded with reluctance, and evaded by every possible stratagem; but capable of ready compensation, either in land or money, on well-known terms. *The public*, without any advantage whatever, sustains a double loss; first, in the impediments which are opposed by fines arbitrary to the improvement of the land, and particularly to its circulation, by the fine *on alienation*; and next, in the injustice sustained by creditors, from copyholds not being either extendible by *degit*, nor assets for payment of debts.

TITLE VI.

OF TITHES.

ON the subject of this litigious and most impolitic *servitude* on land, much more cogent matter might be urged than on any precedent topic ; *and that* accompanied with a practicable scheme for the equitable and gradual abolition of tithes ; *commencing with the large proportion of them belonging to lay impropiators.* The prejudice, however, at present prevailing in many powerful quarters on this subject, would, I feel fully impressed, not only prevent any beneficial effects from its discussion, but also extend itself to the other parts of this essay. I feel, therefore, most reluctantly compelled to silence.

TITLE VII.

OF REGISTRATION ; AND HEREIN OF EQUITABLE NOTICE.

CHAP. I.—*Of Registration.*

REGISTERS of dispositions affecting land were first introduced by the legislature, upon giving legal validity to uses, which had the effect of superseding the solemnity of livery of seisin.—Bargains and sales operated, as has been already explained, as transfers of the use, to which the statute (27 Hen. VIII. c. 10) annexed the possession : but, as this was a secret transaction, the act, c. 16, of the same year, required all bargains and sales of estates of inheritance or freehold to be enrolled, within six months, in some court of record at Westminster. Subsequent acts of Eliz., Chas. II., Anne, and Geo. II. allowed bargains and sales of lands within the counties palatine of Lancaster, Chester, and Durham, the Bedford level, and the different ridings of the county of York, to be enrolled in their respective local courts and registers.

It seems to have been contemplated, when the enrolment act of Hen. VIII. was passed, that lands would thenceforth be chiefly passed by bargain and

sale. The act, however, did not extend to bargains and sales for a term of years ; upon which omission, a mode of conveyance was afterwards devised, and gradually adopted, of conveying by a bargain and sale for a year, and by a release of the inheritance, as has been already explained. By this oblique method (which is called a lease and release,) the act for enrolment was evaded ; and although propositions were made from time to time for a general enrolment of deeds, yet none ever took place. Local acts have, however, been passed in different counties and districts, for registering deeds and wills relating to lands within them. They consist of 15 Car. II. c. 17, for the Bedford level ; 2 and 3 Anne, c. 4, for the West Riding of the county of York ; 6 Anne, c. 35, for its East Riding, and the town of Kingston-upon-Hull ; 7 Anne, c. 20, for the county of Middlesex, with some exceptions ; and 8 Geo. II. c. 6, for the North Riding of Yorkshire.

These different registry acts apply to instruments of every description. In the instance of *deeds*, they do not, like the enrolment act, limit any time for registry ; but they render the unregistered assurance void, as against any subsequent purchaser or mortgagee, claiming under a deed previously registered ; leaving it to its full operation in every other respect. As to *wills*, they were rendered void against subsequent purchasers, or mortgagees (*i. e.* from the heir,) unless registered within six months after the testator's death, if dying

within Great Britain; or within three years, if dying upon or beyond the seas. If so registered, however, they would prevail, even over a prior registered conveyance from the heir. In these respects the different acts are uniform; but they vary in their different provisions in the cases of wills contested or concealed. They all exclude from their operation copyhold estates, and leases not exceeding twenty-one years, where the actual possession accompanies the lease; considering the former as sufficiently registered in the court rolls, and the latter as too unimportant, and as carrying its own evidence in the possession.

Provisions have been made by different statutes for protecting *purchasers* (which word includes mortgagees,) in respect of judgments entered against their sellers. By the stat. of frauds (29 Car. II. c. 3.) a fictitious relation, which all judgments had to the first day of the term wherein they were obtained, was destroyed, as against purchasers; and their effect was confined to the day on which they were signed; and, for the facility of search (which, from the variety of courts, and the number of judgments entered up, was rendered almost impracticable), by 4 and 5 William and Mary, c. 20, all judgments entered up in each term were required to be put, by the proper officer, into "an alphabetical dogget," or list (and hence the phrase of docketting judgments,) before the end of the ensuing term.

By the recent act of 1 Geo. IV., c. 119, commis-

sioners of bankrupts are authorized to sell the bankrupt's lands, by deed enrolled in any court of record. No time, however, is fixed for enrolment, any more than it was by 13 Eliz. c. 7, from which this provision has been taken.

Finally, by 53 Geo. III. c. 141, memorials of all grants of life-annuities for money are required to be enrolled in Chancery within twenty-one days, or else the grants are to be void.

Such have been the principal legislative provisions for registering transfers of, and liens upon land. Within certain districts they extend to assurances of every description ; but in the country at large they are confined to the instances of bargains and sales of freeholds for money (now seldom used), or by commissioners of bankrupt ; of sales of life-annuities, and of judgments to affect purchasers. All our regulations, both general and partial, are deficient on an occasion which perhaps the most requires it ; that of recording the facts necessary to establish a descent from an intestate, which do not, of necessity, admit of documentary proof. Such, however, as the laws of registration actually are, our courts of law have left them to their own operation ; it being expressly determined, in the instance of registration, that there priority of time shall alone prevail.

It may be, and has been assumed that, in every case of registry, whether so called, or whether termed enrolling, or docketting, the legislature

meant it to operate, not merely for the information of the purchaser, in case he chose to search, but also by way of binding notice to him, whether he searched or not. How indeed could *he* be deemed a *bond fide* purchaser, who would not avail himself of the public means afforded him to ascertain the state of his seller's title?

CHAP. II.—Of *Equitable Notice*.

Upon the enrolment act of Hen. VII., and the docketting and registering statutes, however, equity has introduced, under the name of *notice*, a totally different construction, which has been nearly subversive of these descriptions of acts, and has raised a complicated system, much more grievous than any of the individual hardships meant to be redressed.

They have determined, on the one hand, that a person buying an estate, *with notice* of a prior incumbrance *not registered*, shall, in equity, be bound by it, *although he has duly registered his own conveyance*. On the other hand, they have held, that a person, having the legal estate as mortgagee, and advancing more money, *without notice* of a second mortgage *duly registered*, shall hold, in respect of it, against the second mortgagee. In the former case, an unregistered deed is preferred to a registered one. In the latter, registration, even coupled

with priority of time, is of no avail. It is, indeed, urged, that the first mortgagee possesses that fiction termed the legal estate, and that both mortgagees are in *pari delicto*. But, (passing the technical advantage) if there be blame in the want of search, the second mortgagee affects only himself by it, whereas the first mortgagee affects also the second.

In analogy to the foregoing resolutions, it is held in equity that, although a judgment be not docketed, yet, if a purchaser have notice of it before he completes, he shall be bound by it. He already possesses, it is said, that information which the statute of William and Mary intended to furnish him; but to this it might be replied, that he also knows an undocketed judgment is rendered void against himself; and that the judgment creditor might not have intended to rely upon the land contracted for.

The nature of equitable notice, and whether it is in all cases equivalent to registration, will be the next point of inquiry.

Notice is either *actual* or *constructive*. The former, being a communication to the purchaser himself, would seem to need no comment; but even here distinctions arise, as to what shall amount to notice. A loose intimation, that the land belongs to another, is not so; nor was a discussion on a private bill in parliament allowed to affect a mem-

ber, who afterwards purchased. Notice, too, on a prior purchase, by means of a deed, incidentally relating to land which becomes the subject of a subsequent purchase, will not suffice. *Constructive* notice, however, is a wide field of presumption. So numerous, indeed, are the distinctions, that I shall merely give the outlines, dividing the subject into, *First*, what facts will amount to notice ; and *next*, what shall be proof of these facts.

Evidence is either written or parol. Notice of the former character, or *documentary*, is divisible as follows : *First*, Judicial acts. And here *lis pendens*, or a pending suit, is notice in equity, with the following distinctions : It must relate to the very estate in question, but it need not be contentious. A bill to perpetuate the testimony of witnesses is sufficient. There are, who carry it so far as to maintain that, if one purchase after a bill is dismissed, and then the unsuccessful party appeal to the Lords, the purchaser is bound by the consequence of the appeal, although there was no suit then pending ! But a decree in equity, in a past suit, is not notice. Nor do courts of equity appear to have shewn the same complaisance to actions pending at law, though equally notorious, as to suits in their own courts ; and judgments, even when docketed, are not notice in equity. *Secondly*, Bankruptcy, and the proceedings on it, are of a mixed character ; the act being private, the commission being an official, and therefore a public

transaction, and all the subsequent proceedings being of a judicial character. The act of bankruptcy is not of itself notice,—nor even is a commission, without an adjudication under it; unless in the single instance of one having purchased, without notice of any prior act of bankruptcy, more than two months before the date of commission; in which case a commission issued, though afterwards superseded, or a docket struck, is constructive notice, to deprive him of the benefit of this protection. *Thirdly*, Court rolls are also of a mixed character; but the rule seems to be that, if a purchaser has a sufficient title deduced to him by the abstract, accompanied with the copies of court roll under which the seller holds, he is not bound to search the rolls themselves; but if he does, he is affected with notice of their contents. *Fourthly*, Private instruments involve various distinctions. Whenever a document is necessary for deduction of the title, a purchaser is bound to inspect it, and is therefore affected with notice, not only of its contents, but also of whatever facts it leads to, whether by recital, description of the parties, or otherwise; and this has been carried so far as to bind a purchaser, not merely to facts, but also to the construction placed by equity upon those facts. On the other hand, statements on the face of a deed, which amount to a mere suspicion of fraud, do not oblige a purchaser to extend his inquiry into extrinsic facts; as, where a tenant for life, with power to appoint to all or any of his chil-

dren, appoints to one, and then both of them immediately sell, and receive the money jointly, a purchaser is not bound to inquire whether there was any sinister agreement between the father and the son. But here classification begins to fail, and the rule to terminate, in individual and doubtful cases ; as, for instance, it seems scarcely settled whether, *in the instance of a purchaser* under a settlement made pursuant to marriage articles which, in their literal construction, would give the seller the power of disposal, but might, by the large interpretation of a court of equity in favour of the intent, secure it to the issue, their ordinary rules of interpreting shall be deemed general notice. I will close the head of private documents with observing, that, being witness to an instrument is not, of itself, considered notice of it.

The next class of constructive notices consists of acts *in pais*, or unwritten facts. And, *first*, notice to the counsel, agent, or attorney of the party, is notice to the party himself; and this, even if it be to the town agent of the purchaser's attorney residing in the country ; or if the sale take place under the direction of a court of equity ; or for the benefit of an infant ; or if it be to one who purchases in the name of another, though without the latter's priority, provided he afterwards consent ; or although the agent be employed in part only, and not throughout the transaction. It must, however, be in the same affair, not in a different one. *Secondly*, the pos-

session of a tenant is notice of any lease he may have, although the purchaser may be informed, or take it for granted, that he holds from year to year. So, if the tenant even change his character, by contracting to purchase, his possession, though ostensibly that of a tenant, is deemed notice of his contract; and the like has been ruled as to an agreement for a lease, posterior to that under which he actually held. In fact, the present rules of notice oblige a purchaser to have communication with each tenant, as to the extent of his actual interest, in whatever character. But, on the purchase of a lease, if (according to the rule already noticed) the grant was fair on the face of it, the purchaser is not bound to enquire into the merits of its terms, as in the case of an improvident lease of charity lands, afterwards purchased without notice. On other points there are resolutions which do not quite square with the weight given to possession, as proof of an interest. Thus, a tenancy is not considered notice of the title of an equitable *lessor*, where the purchase was made from the owner of the legal estate. So, where one enjoyed land for several years, under a covenant to surrender them to uses, and the covenantor afterwards surrendered them, for a valuable consideration, to the use of another—the latter's title was established.

A system founded on constructive facts must necessarily generate nice distinctions of proof. The ordinary rules of evidence are of course admitted,

TITLE VIII.

OF THE SOURCES OF THE LAWS OF REAL PROPERTY,
AND THE TREATISES UPON THEM.

LIKE those of most governments established in an early state of society, the English laws consist of a series of customs, sanctioned by judicial decision, systematized in the course of time, and with the aid of commentators, and occasionally corrected by the legislature. These together form the two branches of *the common law*, as dispensed by the judges, and *the statute law*. To these, in the instance of property, has been added, in more modern times, by the interference already shewn, of equity, a third source of laws, equivalent to either of the other two.

The authorities on which these different institutions repose are threefold :—*First*, *judicial decisions* in the courts of law and equity, with which the public are made acquainted by means of reports. *Secondly*, *the text books*, or treatises on various subjects of law and equity. Of these the earlier ones are quoted as law, where judicial authority is wanting. And, *thirdly*, acts of Parliament. A *fourth* description of compositions necessarily sprung up with the increase of the law, namely *digests* and *abridgments* ;

which either gave the substance, or arranged under different heads the various branches of the law, grown unmanageable by successive accumulations.

Without tracing the gradual progress by which the authorities and compilations on the laws of real property have swollen to their present unwieldy size, it will suffice, for the present purpose, to give a dry statement of the number of ponderous tomes comprising them.

First, The reports from the year books (which begin in Edward II.'s time) inclusive, down to the present time, consist of about 347 volumes, namely, 88 folios, 8 quartos, and 268 octavos. In these are not included reports relating to the courts of Admiralty, elections, settlement cases, magistrates, &c., nor Irish Reports. The multitudinous mass of modern reporters has, however, become unmanageable, even with the assistance of the copious indexes annexed to each volume. To render their contents accessible, *digested* indexes have from time to time been framed of the more modern reports, both at law and in equity, forming now a total of 33 volumes.

Secondly, The text books, or treatises, consist of about 184 volumes, the principal part of which are octavos. About 114 of them relate solely to real property; the remainder are of a mixed character.

Thirdly, The statutes, from the reign of Hen. III. inclusive, down to the present time, are comprised, in Ruffhead's 4to edition, in 26 volumes. Various

abridgments and indexes have been compiled of them in about 20 volumes.

Fourthly, The digests and abridgments of the law consist of fourteen distinct compilations, comprised in 67 volumes, of which the greater part are octavos, and the residue folios and quartos.

The result is, that our laws of real property are to be sought in the copious library of 674 volumes, exclusive of indexes to the statutes. If from this collection we make a liberal deduction for obsolete and redundant treatises, and works of slight esteem, or only occasional relevancy, there will still remain a total of upwards of 600 volumes !

PART II.

**OF THE REMEDY FOR THE DEFECTIVE
STATE OF THE LAWS OF REAL
PROPERTY.**



PART II.

OF THE REMEDY FOR THE DEFECTIVE STATE OF THE LAWS OF REAL PROPERTY.

I SHALL now proceed to the second and more agreeable part of my task, and endeavour to point out the suitable correction of the incongruous and overwhelming mass of laws which has been exhibited to the reader. There are two modes of effecting this: one by applying partial remedies, wherever the institutions are redundant, inconsistent, or deficient;—the other, by framing an entire new code of the laws of real property. I shall give each a full, and, I trust, an impartial consideration.

More than two centuries ago, the present subject attracted the attention of a lawyer and a philosopher, who classes among the brightest ornaments of this country; and who, in having pointed out *experiment* as the true road to natural science, has conferred on mankind an obligation which will cease only with their race. In his treatise, *De*

Augmentis Scientiarum, lib. viii., Lord Bacon has the following aphorisms on the excessive accumulation of laws.

APHORISMUS LIV.

“ Duplex in usum venit statuti novi condendi ratio. Altera statuta priora circa idem subjectum confirmat, et roborat; dein nonnulla addit, aut mutat. Altera abrogat et delet cuncta quæ ante ordinata sunt; et de integro legem novam et uniformem substituit. Placet posterior ratio; nam ex priore ratione ordinationes devenerint complicatæ et perplexæ; et *quod instat agitur sane; sed corpus legum interim redditur vitiosam*. In posteriore autem major certe est adhibenda diligentia dum de lege ipsâ deliberatur; et anteacta scilicet evolvenda et pensitanda antequam Lex feratur; sed optimè procedit per hoc legum concordia in futuro.”

In the next section, “De novis digestis legum,” the fifty-ninth Aphorism is to the same effect, and highly stimulating to legislators who may undertake such a task.

“ Si leges aliæ super alias accumulatæ in tam vasta excreverint volumina, aut tantâ confusione laboraverint, ut eas de integro retractare, et in corpus sanum et habile redigere ex usu fit; id ante omnia agito, atque opus hujusmodi *opus heroicum esto; adque auctores talis operis tanquam legislatores, et instauratores rite et merito numerantur.*”

On the practice which, from the inertness of the legislature, has been so prevalent in our laws, of reconciling their inconsistencies by judicial refinements, the fifty-sixth Aphorism is couched in the following pointed language:—

“Neque vero contraria legum capita reconciliandi, *atque omnia (ut loquuntur) salvandi* per distinctiones subtiles et quæsitæ, nimis sedula aut anxia cura esto. *Ingenii enim hæc tela est.* Atque utcunque modestiam quandam et reverentiam præse ferat, inter noxia tamen censenda est; utpote quæ reddat corpus, universum legum varium, et malle consuetum. Melius est prorsus, ut succumbant deteriora, et meliora stent sola.”

What our great countryman conceived, has been executed in modern times by the energy of the French nation, aided by the genius of Napoleon; whose boast it was, (and with every appearance of truth,) that he should descend to posterity with his Code in his hand.

This tacit reproof might have been endured by Englishmen, under the palliative, that the subversion in France of all established institutions, made a clear field for perfect system. But we have a second lesson, without a similar excuse, from the plain sense and steady perseverance of our less mercurial neighbours of the Low Countries; whose government, with the assistance of permanent commissioners, have made considerable and

much-applauded progress in the correction of her civil jurisprudence(*a*). Nor is this all. Much as we may admire the exalted taste and frequent genius of the individual Roman, it is yet a mortifying reproach, while it forms a singular coincidence, that England, with her pre-eminent pretensions in the science of government, should be now preceded by the Papal state in the reform of her civil institutions(*b*), as she was formerly in that of her calendar(*c*).

ALTERNATIVE OF PARTIAL CORRECTION, OR A NEW CODE.

Still, it is due to the importance of the subject to ponder well, whether the defects in our laws of *real* property may not be corrected by judicious curtailment and occasional alteration, rather than resort to the bold experiment of total abrogation, and the formation of a new code. For this purpose, I shall take a rapid review of the causes to which these defects are attributable; distinguishing any which

(*a*) See, in addition to former public communications, the Speech of the King of the Netherlands, in the Morning Chronicle of the 24th October, 1825, from the "State Courante" of the 18th October.

(*b*) Pontifical Decree of 5th Oct. 1824, in the Morning Herald of 3d Dec. 1824.

(*c*) Lord Chesterfield's Letters. Letter 215.

may admit of correction, from those which demand extirpation. In applying afterwards the appropriate remedy, I shall illustrate it, occasionally, from various parts of the laws themselves, which here and there afford the precedent of a better institution, and thus remove the charge of novelty. I shall also resort to the authority of the "*Code Napoleon*," wherever its regulations may admit of a direct practical application.

The three great causes to which I have attributed the redundancy of these laws, are *tenures*, *uses*, and *passive*, or mere formal *trusts*, as contradistinguished from operative or active ones. The first of these rests upon a system which has long ceased to influence society; while its theory still pervades and augments every part of our laws of real property. The second, namely *uses*, though first introduced by churchmen to evade the restrictions against mortmain, was continued to avoid the rigour and intractableness of *tenures*. With the removal of the evil, the remedy would surely become useless. The third and last cause is, in effect, only a different species of *uses*, originating in the narrow construction they received from courts of law, which occasioned the Chancellor to take under his own cognizance what the judges rejected. The principle, therefore, which would abolish *uses*, would involve *formal trusts*.

But, exclaims the man of precedent and practice, What guides, what rules; will you leave us, if you

destroy these landmarks of landed property? My reply is, They do not fix, they do not regulate, but merely obscure the only essential purposes of property, namely, enjoyment, transmission, and legal liability. Remove them, and these rights will exhibit themselves more intelligibly, governed by rules comparatively few and simple. If a practical illustration be wanted, view our laws which regulate the disposal and modification of personal property. There we discover no traces of tenure, nor of uses, and little of mere formal trusts; those which subsist being necessary, not to keep the legal interest and the benefit distinct, but to protect the property, which is of a more frail and exposed character than land. I would also cite the institutions, equally simple, of the Code Napoleon on this subject. Take the two systems just alluded to; and, with the only material variation, which equally pervades both, of partibility of succession for primogeniture, they would furnish the outline of a code of real property embracing every legitimate object, without a trace of the excrescences of tenures, uses, or passive trusts.

The fact indeed is, that, from the practice of centuries, with the occasional interference of the legislature to remove anomalies, the different parts of the complicated systems in question cohere tolerably among themselves. It is not in any individual defects that the objection lies; *the entire nuisance requires to be abated.*

The alternative of partial correction, or a new code, as applied to the remaining defects in the laws of real property, may be more summarily disposed of.

In succession, the admission of the half-blood, and of lineal transmission, (which are now excluded by the technicalities of tenure;) and the substitution of the state, which protects all property, for kindred so remote as to be lost in the general mass of mankind, and for the feudal right of escheat, give a new and totally different character to this branch of titles.

The rights of marriage, involving curtesy and dower, and the wife's separate estate, require correction; but on principles wholly different from those on which these rights at present rest. Any thing under the form of an amendment must resemble that which so frequently occurs in either house of parliament; of omitting, and providing a substitute for, all but the first word.

The modifications of estates next present themselves. Of these, many of a mere technical character would disappear, by abolition of the three systems I have just rejected. Among the remainder, the estate tail is the most objectionable, both in its existence, and the mode of destroying it; for, unlike every other interest, it is scarcely ever suffered to die a natural death. Any mere regulation upon it (as, by substituting some less costly bar than a fine or recovery), would only im-

pose the necessity of keeping alive so uncouth an institution. Nothing short of abolition will serve.

Proceeding to alienation and charge by deed, or other act *inter vivos*, great havoc will be made by the abolition of tenures, uses, and passive trusts, in the technical regiment I have exhibited of the different assurances depending on these systems—one simple form, but necessarily new, will suffice for each alienation, and for each charge.

Testamentary disposition will admit of nearly equal improvement, both in its attendant formalities and its substance; and it is singular, that the provision which will the most *enlarge* its operation, namely, the extending it from real property, to which the testator is entitled at the making of his will, to all that he may be entitled at his death, will at the same time, and in a correspondent degree, *abridge* the law on this subject. So important and so radical indeed, are the improvements, and of a character so variant from the existing laws, that what little might be preserved of the latter, would operate but as a foil.

The doctrine of powers, like other existing institutions, will be influenced and simplified by the abolition of tenures. Other *peculiar* improvements have been hinted at, which cannot be effected by a reference to the present system, but will assume the shape of new and fixed laws, and require the entire system to be recast.

The rights of creditors require, at the same time,

both enlargement and simplification. Any reference to a statute of Edw. I. or Car. II., (however excellent each in its day,) would not meet the exigency, while it would perplex the remedy.

If *any* laws are incorrigible, they are those for the administration of the assets of the deceased. It is sufficient to refer to my exposition of the actual system on this subject.

The like, I think, may be safely said of the laws of limitation of time. A few simple and *direct* enactments on the subject would surely be far preferable to the inextricable labyrinth of real actions, and to the bar, so circuitously and obscurely deduced, in our chief practical remedy of ejectment, from the period to which a right of entry is restricted.

The peculiar laws of copyhold, forming a code of themselves, surpassing all the necessary distinctions in an entire system of laws of real property, would be swept away with those of tenure.

The laws of registration, and of equitable notice, present, instead of a system, an uncouth mass of conflicting institutions. The former demand uniformity and method—the latter utter abrogation.

But an advantage, nearly equal to the aggregate of those already enumerated, would result both to the public, and to the professors of the law, from sweeping away the ponderous pile of volumes in different ages, various languages, *Norman, French,*

low Latin, and *modern English*, in which the laws of real property are to be sought. Viewed as to their mere number, (a total of upwards of 600 volumes,) and the expense and time necessary to collect and digest them, they are a sealed book to the public, and even to the bulk of the practitioners: Already have the latter found it necessary to confine their attention to the modern reporters; and occasionally to rely even on the second-hand authority of digests; while the more ancient collections still retain their authority, when explored by those whose narrow, but keen views, confound laws with justice, to entrap or perplex the unwary claimant.

Even in Lord Bacon's time, when law books did not reach a fiftieth part of their present number, the evil was deeply felt, and is strikingly described in the following aphorism, respecting the multiplication of *text* authorities; which form one among the many sources of the over-accumulation of laws.

APHORISMUS LXXVIII.

“ Nihil tam interest certitudinis legum, quam ut Scripta Authentica inter fines moderatos coerceantur ; et facessat multitudo enormis auctorum, et doctorum, in jure ; unde laceratur sententia legum, *judex fit attonitus, processus immortalis, atque advocatus ipse, cum tot leges perlegere et vincere non potest, compendia sectatur*, glossa fortasse aliqua bona ; et ex scriptoribus classicis pauci, vel potius scriptorum paucorum paululæ portiones recipi possunt pro authenticis.”

Till the present indigestible heap of laws and legal authorities is consigned to oblivion, in vain will the public seek an uniform system of real property. They would, perhaps, be too sanguine in hoping for a code, so simple, and yet so explicit, that every individual of common capacity might understand his rights on each practical occasion. The modifications of this property are too various, the transactions respecting it too numerous, and the language in which these are couched often too doubtful to admit of such expectations being realized. The distinctions and refinements arising upon these must unavoidably render them the subject of peculiar and constant study and practice.

Still, the general qualities of real property might be sufficiently defined, and, by being comprised in a single code, of moderate bulk, be sufficiently accessible to render the public at large competent

judges of the nature and merits of each institution, and of the *necessary* delay and expense of judicial discussion.

The preceding observations will, I trust justify me in preferring an entire code of real property to any attempts at partial correction. I shall proceed to suggest its principal features ; but the foundations must be cleared, by removing the obstructions of tenures and other unessential servitudes, (with one, I fear, insurmountable exception,) and of uses and passive trusts. Some of the burdens alluded to cannot be displaced without an adequate compensation, which will require adjustment. The proposed institutions must, therefore, be preceded by provisions for these objects. Frequent and important changes indeed, are also necessary in other branches of our existing institutions ; but as these laws, though variously modified, will still, in principle, form component parts of the proposed system, they will be incorporated, without any express abrogation of the rejected parts.

In so untried a field, the first suggestions must necessarily be imperfect, both in their contents and their omissions ; nor shall I attempt more than I strictly profess, a bare outline. On the part, therefore, of those who may dissent from the measures of a code, it will not avail to say, " You have passed over many important features ; for instance, the laws of voluntary conveyances, and mortmain ;" or — " The *legal incidents*, which you propose as sub-

stitutes for powers ; or your scheme for a general registry do not embrace an entire view of these ample subjects." To these, and to all similar objections, my answer would be, I have already redeemed my first pledge, of shewing, that our present system of the laws in question is utterly incapable of correction. The object of this my second part is, not *to complete* a new code ; but to shew, that the task *is practicable*. Let but the design be approved, and the outline may be speedily and correctly filled up.

In the execution of this task, I shall, after the example of the " Discussions du Code Civil," give the actual institutions, first of the preparatory abrogations, and next of the proposed system, in running numbers ; and shall subjoin to each, the motives which suggested it. A mode which will keep the institution distinct from the argument, render the former susceptible of the readiest quotation, and expandible hereafter to any extent, without derangement of parts ; and will admit of the separate discussion of each, or any article, either of text or comment.

PRELIMINARY ENACTMENTS.

ENACTMENTS PRELIMINARY TO A CODE OF REAL PROPERTY IN THOSE PARTS OF THE UNITED KINGDOM OF GREAT BRITAIN CALLED ENGLAND, IRELAND, AND WALES, AND IN THE FOREIGN POSSESSIONS AND DEPENDENCIES OF THE SAID UNITED KINGDOM.

1.

All tenures of lands and hereditaments, and all incidents of tenure, shall from henceforth be utterly abolished; with the exception of copyhold tenure, rents service, reliefs in respect thereof, and heriots.

A further exception may be found necessary of feudal titles of honour (see 12 Car. II. c. 24. sec. 11.) but, as this is a solitary instance, and the mode of effecting it is open to discussion, it is passed over in this mere outline. It is trusted, that regard to principle will occasion the mere feudal feather of grand-serjeantry (ib. sec. 7.) to be relinquished.

As, in the theory of our law the game belongs to the lords of the manors, and different acts have given them large privileges for its preservation, the extinction of these seignories will necessarily excite

alarm on this head in the owners. But the game, in effect, belongs to the owner of the soil, who, if the lord or his keeper enter upon it, may bring trespass against him; so that the lord's right is merely nominal, beyond his own soil. Add to this that, from the effect of the statute of *Quia Emptores*, 18 Edw. I., which transfers the seignories of all lands aliened, from the alienor to the next superior lord, and thus, whenever a lord aliens any part of his demesne, takes it out of his manor, the actual extent and boundaries of manors, by these means rendered ambulatory for a period of six centuries, is now become most difficult of ascertainment. In order to unite the privilege to the burden, to extinguish unavailable rights, and to substitute certainty for uncertainty, I have no novel and unpalatable theory to propose; but merely to recommend the existing provisions of the legislature with respect to *Wales*, where, as tenures never prevailed, and they have no feudal manors, and but few even of a questionable character, the act of 59 Geo. III. c. 102, has authorized any persons entitled for an estate of freehold, to lands within the principality, of the clear yearly rent of 500*l.*, and not within the bounds of any manor, to appoint a gamekeeper, with the ordinary privileges, for the same, and for similar lands of any person who shall so authorize him.

- 2.

His Majesty may issue several commissions into the different counties to effect the enfranchisement of all copyholds, the extinction of all heriots, feudal rents, and reliefs thereon, fee farm and other perpetual rents, and also of all forests, chases, and fee warrens, within the same.

It is proposed to effectuate these enfranchisements and extinctions, by commissioners, who shall give compensations to his Majesty, to the lords of manors, and other proprietors of the rights in question, either by allotments of the lands affected by them, or in money, as is every day's practice in enclosure acts. As their labours will vary in different counties, distinct proclamations are advisable; as it also is that the commissioners should make negative returns, where (as will sometimes be found the case) none of the burdens in question may exist.

It may excite surprise that, in a mere elementary project, I should descend to articles so minute, and apparently so little objectionable as perpetual rents. But my object is, to free the land for ever from all unnecessary servitudes. In France such reservations were of frequent occurrence; ease and leisure combining themselves more in that country than in England with the sentiment of enjoyment, and they were more especially prevalent in the poorer countries of the south, from the inability both of the

proprietor and the cultivator to find capital. But, by the Code Civil, 530, "toute rente établie a perpétuité," as the price of real property, is rendered redeemable after thirty years. A long and able discussion took place on the subject, and the grounds on which this law finally prevailed were, that perpetual rents were onerous to the owner of the land, occasioned difficulties to the heirs, both of the grantor and the grantee, on any division either of the land or the rent, and impeded the alienation of the land.—2 Discuss. 568, &c.

3.

His Majesty may issue several commissions to the different counties to effect the divisions, allotments, and enclosures, of all common field lands, commons, and waste lands, lying within the same.

The foregoing enactments will dispose of all servitudes on land, arising from the feudal system, and the generality, if not the whole, of all other burdens unessential to the rights of the public, or to the enjoyment of any adjoining or other property ; with the exception of tithes, which, for the reason assigned in Part I. Tit. vi., I am compelled to pass over. In removing these various charges we not only simplify the law ; but effect, in most instances, a political reform of at least equal importance, by encouraging the improvement of the soil, to which the sole and exclusive ownership is the first in-

ducement. No prudent person meliorates, at his own expense, that in which a stranger has a common interest with himself. What copyholder now builds on his land, to pay an increased fine to the lord; and what occupier willingly produces crops of grain exposed to the *legal* ravages of deer?

4.

After returns shall have been made to the several commissions authorized by the 2d and 3d articles, his Majesty may issue a proclamation, declaring that the purposes of all such commissions have been fulfilled; and fixing a period from which all tenures by copy of court roll, all heriots, feudal rents, and reliefs thereon, fee farm, and other perpetual rents, all forests, chases, and free warrens, and all rights of intercommonage, and common, and all incidents to the said several privileges belonging, shall for ever cease and be abolished.

Provided that the preceding enactment shall not operate to affect any customary grant of copyhold lands or tenements usually holden for lives, to any nominee or nominees, in trust for the beneficial owner, while such tenure shall subsist.

This bespeaks itself as a necessary temporary provision. There may be others of the same character, which should be added.

5.

No use, trust, or confidence, either legal or equitable, shall be declared of any land, or in any charge upon the same, for the mere and direct benefit of any third persons ; and all assurances declaring any such use, trust, or confidence shall, so far as respects the same, and the estate or interest to which the same shall relate, be utterly void.

Provided that any person or persons may be intrusted with the actual disposition or management of lands or hereditaments, or the rents or profits thereof, or any interest in or charge upon the same, for any lawful purposes, for the benefit of the owner thereof, or of any other person or class of persons ; and the same may be assured to such trustee or trustees accordingly.

Provided also that the principle article shall not prejudice any trusts resulting or arising from construction of laws.

The better opinion is, that the statute of uses (27 Hen. VIII. c. 10.) meant to engraft the laws of uses upon those of tenures, as finding them more susceptible of the different modifications which the wants of society required. My object is, as has been already stated, to effect the same purpose by more simple means ; namely, the direct disposition of the land itself to the alienee, as will, with this view, be enjoined by the subsequent article 37.

As formal or passive trusts are nothing more than

equitable uses, I propose to abolish them by one and the same enactment. The first proviso is meant to preserve *active* or *operative* trusts, agreeably to the distinction I have already taken. Within this latter class will fall all trusts for sale, whereby the land will in effect be aliened ; or for creditors, whether by the same means, or by the appropriation of rents and profits ; or for management of the property on behalf of any class of persons, such as a joint stock company ; or of an owner going abroad, or any donee during infancy, &c. Of the laws by which these trusts should be regulated, I shall have further suggestions to make hereafter.

On the subject of the last proviso, see further art. 88, *post*, and the comment.

6.

When his Majesty shall have issued his royal proclamation, pursuant to the 4th article, and from the period for abolition to be fixed thereby, all the laws now in force respecting real property shall cease ; except such as relate exclusively to tithes.

7.

From henceforth, until the period to be so fixed by such proclamation, all such of the laws now in force respecting real property, as are inconsistent with the preceding articles, and the code subjoined, shall cease ; except as in the preceding article.

OUTLINE

OF A

CODE OF THE LAWS OF REAL PROPERTY,

IN THOSE PARTS OF THE UNITED KINGDOM OF GREAT
BRITAIN AND IRELAND, CALLED ENGLAND, IRELAND,
AND WALES, AND IN THE FOREIGN POSSESSIONS AND
DEPENDENCIES OF THE SAID UNITED KINGDOM.

TITLE I.

OF REAL PROPERTY IN GENERAL.

1.

THE expression land comprises the land itself, all buildings and other articles erected upon and affixed to the same ; all trees and underwood growing thereon ; and all minerals, quarries, and fossils in and under the same.

As the phrases “ manors, tenements,” and whatever else savours of feudality, will vanish with that system, the object here proposed is, to describe real property throughout the articles by a single

word, well defined. With respect, however, to fixtures, the distinctions vary between heir and executor, landlord and tenant, &c., and it may hereafter be judged expedient to declare these by an additional article.

2.

Land may be enjoyed and disposed of, either in perpetuity, or for a limited period, as for a term of life or years. Dispositions respecting land may be made either in possession or expectancy, and upon events either certain or contingent. Land is also susceptible of a charge or a servitude. But all modifications of interests affecting land are subject to the regulations hereafter established.

It would be proper to subjoin here the leading regulations respecting servitudes; as, rights of way, water, light, party-walls, &c. Some excellent institutions on this subject may be found in the Code Napoleon, lib. ii. tit. 4.

3.

Where land is not limited in interest by the disposition either of the law or of man, every owner is entitled to it in perpetuity.

On this article see the observations subjoined to a. 40.

4.

Land, or limited interests in it, may be acquired, 1. By descent. 2. By the legal rights of marriage. 3. By disposition by deed or will. 4. Under the rights of creditors. 5. By adverse possession, or lapse of time. 6. By lapse to the crown, for want of heirs.

TITLE II.

OF DESCENT (a).

5.

LAND is descendible, first, to the children and other issue of an intestate; then to his parents and other ancestors, and to his collateral relations, according to the respective proximities of kindred of each class, after the following rules.—

(a) In Part I. of this essay, the modifications of interests in real property precede the different means of acquiring it. This course was adopted, partly on account of the technical and varied characters which our present subdivisions of real property assume, from the three distinct sources of tenures, uses, and trusts, forming, as they do, a disproportionately large part of the whole system; and partly because it has been the arrangement pursued by our commentators on real property, from Littleton down to Blackstone, and therefore the most familiar to the legal world. In reality, however, land, and the means of acquiring it, are the integral points. Modified interests in land are merely fractional parts, and those produced by some only of these means; reduced, also, as such interests will be, to their due proportion, by the extinction of the three main causes of complexity already noticed. It seems, therefore, the better analysis, that the means of acquiring land should form the principal heads; and that fractional interests, acquired by any of these means, should be noticed under such of their heads as are productive of them. Of these, by far the greater part originate in alienation by deed or will.

CHAP. I.—General Regulations.

6.

Proximity of kindred is determined by the number of generations, accounting from the intestate. Each generation, either descending or ascending, forms a degree.

7.

The origin of title to the succession is not regarded.

8.

Right of representation takes place in the issue of children and other lineal descendants, and the issue of brothers and sisters severally dying in the lifetime of the intestate; so as to transmit the inheritance which the parents thus dying would have taken, had they survived the intestate, to their issue, in preference to any surviving kindred of equal degree. Among collaterals, no right of representation is admitted, beyond the issue of brothers and sisters.

9.

Among kindred, whether lineal or collateral, in equal degree of affinity and succession, the male is preferred to the female. Where there are two or more males, the eldest only shall inherit; but the females take altogether.

10.

Brothers and sisters, and their respective issue, shall succeed in the courses of entire and partial affinity hereafter stated; but, in more remote successions, there is no distinction between the full-blood and the half-blood.

CHAP. II.—Order of Succession.

11.

The first course of descent is, to the children and other issue of an intestate.

12.

On failure of lineal heirs, the land devolves on the father for his life. Subject thereto,

13.

It passes to the brothers and sisters, and their respective issue, in the following manner; viz.:

1. *To the full-blood.*
2. *To the paternal half-blood.*
3. *To the maternal half-blood.*

14.

On failure of brothers and sisters, and their respective issue, the land devolves on the mother for her life. Subject thereto,

15.

It descends to the paternal and the maternal lines of kindred successively, in the following order ; viz. :

First, to the father and other lineal paternal predecessors surviving the intestate ; and, failing these, to the paternal collateral relations ; all taking per capita ; and ever preferring the paternal line.

Next, and in the same manner, to the mother and other maternal kindred ; first lineal, and then collateral ; still preferring the paternal line.

16.

Among collaterals, there is no succession in either line beyond the twelfth degree. In default of paternal kindred within this limit, the land passes to the maternal line, within the same limit.

17.

For want of any kindred of the intestate within the degrees prescribed, the land descends to the surviving spouse, if any. If not,

18.

The land devolves to the king.

19.

Any interest for a term of life or lives, or of years, created in land, is not affected by the foregoing laws of descent ; but is transmissible as personal property.

I shall first explain the particular motives which have influenced me in framing each of the foregoing rules of succession; and shall then subjoin a few observations in justification of the principles that govern the English laws of succession to land.

Although, from the unlimited right of testamentary disposition, with the prevalence of settlements among the higher class of landowners, descent on intestacy is of less frequent occurrence than may be supposed by those not practically conversant in this branch of the law; yet the course of legal succession is of some political importance, on account of the influence the law possesses over the minds of the public. The rules of descent give the land to the eldest son exclusively, and divide it among all the daughters. A testator generally does the same; as he also, from a like acquiescence in the law, aided by natural feeling, divides his personal estate among all his children. The *sentiment* of primogeniture is too inveterate, and too intimately connected with the aristocratical part of the constitution, to admit of any interference with this maxim of descent, were any one even so disposed. With respect, however, to the subordinate rules, I trust to find the justification of my amendments, in increased simplicity; in the feelings of the public; and frequently in precedents drawn from other parts of our existing laws.

Art. 7 is framed with a view to simplicity, in

avoiding two different causes of succession ; one for lands descended, the other for lands purchased. Some further observations on this head will be found in commenting on the 9th and 15th articles.

Art. 8 accords with the existing law, except as far as it confines all right of representation, in the collateral line, to the issue of brothers and sisters. This is proposed, because the leading principle of descent is proximity of blood. It is deviated from in the instances stated, merely because the issue proceed from members of the intestate's family, or that of his parents, who would naturally rely upon him, and towards whom his affections must be presumed to extend. The regulation, too, will shorten the course of descent, and consequently the facts necessary to establish it. It has a precedent in our law for the distribution of intestate's personal estate ; which, exempt from all feudal notions, provides, that there shall be no representation beyond brothers' and sisters' children.

Arts. 10 and 13 introduce, with the half-blood, a material alteration. On the subject of it, the legal profession and the public have long entertained but one opinion ; reprobating an unnatural exclusion, founded on reasoning from feudal principles, which, in the case of a purchase, had not even a foundation in fact.

In the instances of brothers and sisters and their issue, I have graduated the scale ; giving the succession first to the full blood ; next to the paternal

half-blood ; and, lastly, to the maternal half-blood. Brothers and sisters of the full blood are the closest alliance of kindred in nature ; forming part of one family, affections are generated between them from the earliest infancy. In the half-blood, they are, on one side, aliens in kindred. The affection of intercourse scarcely exists ; and in matters of interest they are often rivals. Proceeding, however, to more remote collateral kindred, these distinctions cease to exist. It would scarcely, therefore, be worth while to violate the leading canon of primogeniture, in favour of the *full* blood of any *junior* great uncle.

Art. 11 accords with the existing laws.

Arts. 12 and 14 are grounded, partly on filial feeling, and partly on a retribution to the original source from which the property frequently flows. These motives are presumed to operate to the extent of allowing—first, to the father an increased support, as against brothers and sisters, and the absolute property as against the more remote collateral relations ; and next to the mother an increased livelihood, as against the collateral *paternal* relations, and the absolute property, as against *her own* collateral relations. The principle is supported by those parts of the statute of distribution, which, in default of issue of the intestate, gives the whole of his personalty (with perhaps an excessive preference) to the father ; and if no surviving father, admits the mother to an equal share with the

brothers and sisters. The present unnatural exclusion of the parents from the succession, proceeds from the rules of tenure. As to the quaint conceit, derived from a misapplied metaphor, that land cannot *ascend*, it might as well be said, it cannot move laterally. So vulnerable an argument is a simile!

The reasoning on which art. 15 proceeds, in giving land, of whatever origin of title, first in the paternal line, subject to a personal provision for the mother, under art. 14; and then in the maternal line, requires some developement.

It appears at first opposed by the rule, *paterna paternis, materna maternis*. This, however, prevails in our law, as to such lands only as the intestate took strictly by *descent*; not as to what he was entitled to by *purchase*; which, technically speaking, comprises, as has been already shown, not only all land acquired by himself; but also all such as he may have taken either by settlement or devise, though made by his ancestors on either side; forming by far the greater proportion of *all* the lands to which he died entitled; and these go in the paternal line exclusively. As to *purchased* lands, therefore, the two lines stand substantially as they did; except that the mother gains an eventual life-estate, even while there are paternal heirs. With respect to lands *descended*,—taking first the paternal line, the alteration scarcely affects them, but merely gives the land, on their failure, to

the maternal line ; against whom, as well as against the paternal line, the present law of escheat to the lord works an act of flagrant injustice, in cases of title by descent ; since absolute ownership involves transmissibility to kindred of either line ; and a mere stroke of the pen would confer it. Taking next the maternal line, although the preference proposed to be given, as to lands descended in it, to the paternal heirs, may at first appear unjust, yet, upon the balance of accounts, the maternal line will be found gainers. In the first place, the mother, at no very remote period of the descent, takes for her life (and her personal enjoyment is most to be regarded) all the lands on the paternal side, whether purchased or descended ; forming an average aggregate of nineteen twentieths of the whole. Secondly, the maternal line is admitted to all lands *purchased*, after failure of heirs in the paternal line in the twelfth degree ; while, at present, it takes only after an indefinite failure ; a succession distant, doubtful, and often delusive. Thirdly, this line is admitted, for the first time, to lands *descended on the paternal side*, on failure of kindred in it, at the same early period of the twelfth degree.

With these peculiar benefits to the lines themselves, the advantages to the public, on the score of simplicity, certainty, and moral feeling, will be still greater. No questions of origin of title ;—no nice distinctions, whether a devise of land operates to break, or only to change the descent ;—no *per-*

sonal exclusion of the mother by any paternal kindred more remote than the issue of herself or her husband, from lands derived from her own ancestors, but which her intestate child acquired by *settlement* or *will*;—and, finally, no depriving either line, by the law of escheat, of the land, however descended, of its ancestor, in favour of an utter stranger;—nor any of the consequent litigation and destruction of property.

Art. 16, which excludes all beyond the twelfth degree, is borrowed from the 755th article of the *Code Napoleon*. Long before arriving at this remote degree, all sentiment of kindred is frozen; while the exclusion of more distant affinity will protect the land from the mischiefs of wanting an owner, and distant claimants, urged on by speculators, from nourishing doubtful hopes, and incurring certain expense.

Art. 17 giving the land of an intestate, after failure of kindred in the twelfth degree, to the surviving spouse, is borrowed from the 767th article of the *Code Napoleon*. The sentiment of affection, in an individual thus destitute of connexions by blood, cannot be supposed to rest elsewhere.

The principle, too, finds a precedent in our distribution of personal estate, which gives the whole to a husband surviving; and a moiety to a wife surviving her husband, who dies without issue.

Art. 18 proceeds on the fiscal rules, that the state is the ultimate heir.

Art. 19, giving lifeholds and leaseholds for years the quality of personal estate, is framed in adherence to our present law respecting the latter. Lifeholds too possess it occasionally; but this depends on the caprice of the donor; the uncertainty proceeding from which, and other peculiarities attending such interests, have occasioned many distinctions and statutory provisions. To extinguish these, they are placed on the same footing throughout as leaseholds for years.

Both the above interests are, in their substance, real property, and, in strict analogy, should be descendible as such: but long habit, and the circumstances, that they consist as much in the amelioration effected by the investment of monied capital, as in the land itself; that they belong to the middle ranks of life, where the sentiment of distribution prevails, more than to the upper, which affects primogeniture; and the ease with which they are distinguishable from perpetuities, all induce me to leave their present mode of succession undisturbed.

The capacity to inherit is subject to restrictions, in our present law, in the instances of aliens, convicted felons, &c. These apply equally to the ability to purchase; and they class, in reality, under rights of persons. However, therefore, they may, and in some instances they certainly do, require mitigation, this is not the place for the discussion.

I shall exhibit, in Appendix, No. I. two tables of descents ; the one according to our present rules, and taken from vol. iii. of *Cruise's Digest of the Law of Real Property*; being the most modern, and a much approved compilation on the subject; the other according to the proposed canons.

CHAP. III.—*A Comparison between Primogeniture and Equal Partibility.*

Sect. 1. *Of Primogeniture.*

SOME observations will now be hazarded in defence of our English law of Primogeniture. It has often been represented as a harsh and impolitic rule, which, sacrificing natural affection to an ill-regulated passion for family aggrandizement, or to the vanity of supporting an empty name, beggars the younger branches of a family, to enrich the eldest; and prevents the free circulation of property. But let us view a little in detail, first, the extent of property to which this law applies; next, (as influenced by the preceding topic,) its concurrence with natural affection; and, finally, its political effects.

The rule in question does not extend to females. They all take equally; and the public sentiment, generally guided by the law, adopts the same mode of disposition among them. Next, in all settle-

ments of land, the widow's jointure, and the younger children's portions (which are personal property), are charged on the estate, and form large deductions, the one from its income, and the other from its capital. Lastly, and what forms the greatest qualification to the rule, it does not extend to personal property. This, by the law, which, as has been already observed, generally moulds *the sentiment* of disposition, is divided equally among all the children, and other kindred of equal degree. The extent of property embraced by it, consisting as it does of public funds of various kinds—specie—monies invested on mortgages of land and other securities—shipping—machinery—stock, both commercial and agricultural—leasehold estates—the generality of mining concerns, canals, docks, and other similar property, (which latter classes in strictness appertain to land, though rendered, in some instances by the general law, and in others by express enactment, personal property,)—moveables, whether in literature, the fine arts, or for domestic purposes—forms an aggregate far exceeding descendible land in produce and value. In fact, taking the total rental of land in England and Wales at from 23 to 25 millions per annum, its amount is surpassed by some single article in personal property, namely, the interest of our national debt, funded and unfunded, amounting, as it does, to 28 millions per annum.

After the foregoing statement, it will not be too

much to assert, that scarcely one-third of the clear unincumbered property of every description in England is governed by the law of primogeniture. The remaining two-thirds or more, however, must be viewed with this qualification, that they form the first fund for payment of debts.

It has been justly observed by Montesquieu (a), that to educate children is a natural obligation on the parent; to give them his property is one of civil or political institution. This he illustrates by the constitution of different countries. Conceding however somewhat of the strictness of this principle, in favour of natural feeling, it has still been shown that, in our own country, the proportion of landed property is not such as to deprive a father of his power, in conjunction with his testamentary right, to make ample provision for all his offspring. It will, I trust, shortly appear, that the institution of primogeniture does not injure the civil welfare, while it confirms the political security of the public.

Both good policy and our express laws require that land should be commercial, or, in another word, alienable. Indeed, to be assured of this, we need only remark, that a purchaser scarcely ever buys but he improves. But primogeniture, it is said, impedes alienation. The rule however has no such necessary consequence. This *was* the effect of entails; but they have been long since evaded, and

(a) *Esprit des Loix*, liv. xxvi. c. 6.

are now proposed to be abolished. In the mean time the objection to them is of another and a minor character; namely, that they form an uncouth modification of property, the spirit of which belonged to other times, and is now happily extinct; while our law is still embarrassed by the uncertainty of their duration, and the indirect, expensive, and precarious forms (especially in the case of a common recovery), of expanding them into an absolute ownership. The full power of alienation which, in our present laws, each generation in its turn possesses, aided, as it frequently is, by the necessity to discharge the portions of the younger branches, or other charges on the estate—by the extravagance or enterprise of the owner—or by the division of the estate among the female line, break down and scatter, from time to time, the largest masses of landed property, with a rapidity which would surprise any but those long conversant with the changes of ownership. The annual extent of alienations of real property may be brought to an unerring test, by referring to the *ad valorem* duty paid on sales of land, in England and Wales, for the year 1825, being about 440,000*l.*, which, at the average rate of $1\frac{1}{4}$ per cent., would give for the aggregate purchase-money upwards of 35,000,000*l.*; for the aggregate yearly value of the property sold, taking lands and buildings, freeholds and copyholds, estates in possession and in reversion, at one high rate of thirty years' purchase, about 1,200,000*l.* per annum.

An attachment to the soil, and a reluctance to part with the seat of one's ancestors, have in all ages, and under every system of succession, attended the possession of land; and this feeling, added to the peculiar stability of land as property, has rendered it the means of preserving the names and dignities of families. We trace the original sentiment in the affecting story of *Naboth's* vineyard. The more complicated motive develops itself in the brilliant exposition by Montesquieu (a) of the original laws of succession among the Romans. These, while they allowed the property to pass indifferently to all the children of the father, both male and female, under his dominion, kept it always in his family, by not permitting the daughters, who, on marrying, passed into the families of their husbands, to transmit it to *their* children; since this would have carried it into another house. Here we discover the principle of supporting the importance of families by means of their possessions; with this difference, that, in republican Rome, the dignity was attached to the entire family; while, in modern times, it is centered, and along with it the estate, in the head of the family. Deprived of the means of perpetuating their names through their landed property, as the families of modern French at present are, by their rigid system of equal partition, still, even here, we discern an effort towards

(a) *Esprit des Lois*, liv. xxvii.

it, and an attachment to the soil, in the practice among the coheirs, in agricultural countries, if they cannot conveniently cultivate the property in common, for one of them to take it and pay a rent to the others ; or, in richer and more commercial districts, to buy them out.—(*Discussions du Code Civil*, vol. iii. p. 135-7.) M. Berlier's picture, in the latter page, of the simplicity of manners in the rural districts, is highly interesting.

To this universal and most natural attachment to the soil, and its suitableness as property, under whatever system of succession, for preserving the memory and influence of a family, may be added its peculiar value among ourselves, as connected with primogeniture, in preserving the independence of the aristocratic branch of our constitution. With privileges rather for the public advantage than their own, less violent and more consistent than the multitude, if, in past ages, a tyrant was to be coerced or expelled, or in present times, a sovereign is to be *advised*, the arms and the counsel of our nobility have ever been found equally prompt. Without them, whatever may be individual merits, *the many* are as a rope of sand.

Sect. 2. *Of Equal Partibility.*

The Code Civil, of Napoleon, in establishing equal partibility among all the children, and all other kindred of equal degree, has not only prescribed, a system of succession the opposite to ours, of primogeniture in land, but has given that system a more unbending character, by prohibiting to a large extent, voluntary gifts, either *inter vivos* or testamentary. Much speculation has been indulged in this country upon the *political* effects of these institutions; but, with our imperfect knowledge of facts, I will not presume either to imitate, or to repeat it here. Several of the *legal* results, however, of the system, as applied to land, cannot fail to present themselves, on its bare perusal, to the practised lawyer; and upon these I shall somewhat enlarge.

Land, in its nature, is incapable of the same easy and complete division as money and other moveables. The inheritance is either large, consisting of a mansion with pleasurable appendages, and many farms; or small, consisting of a single farm, or tenement, with one homestead and buildings; or, in towns, of a single house. To apportion the lots between the coheirs, in the former case, is

difficult and expensive. In the latter case it is impracticable, without injury to the inheritance. The usual course with ourselves is, to charge the larger lot with the payment of a sum of money for equality of partition. But the parcener has rarely the means of exonerating himself, without either selling or mortgaging. From disagreement or other causes, partitions between female coheirs or their representatives, are frequently effected among us, under the authority of the Court of Chancery. The proceedings, already alluded to, of its commission—the consequent survey—commissioners' meetings—report—order to confirm and convey—the conveyance accordingly, though, for the most part unavoidably consequent on the institution, are in their bare enumeration sufficiently appalling. Unless I greatly err, however, even this catalogue is exceeded, in inconvenience and expense, by the system of partibility of *Code Civil*; to a brief consideration of which I shall now proceed.

It must be borne in mind that, in France, the coheirs succeed both to the property and the liabilities of the deceased; but, with the benefit of an inventory, if the latter are suspected to exceed the former, (Lib. iii. tit. 1. sect. 3.) and with the qualification as to moveables, that executors may be appointed of them; but their office can endure only for a year, and the coheirs may determine it sooner, in offering the amount of the legacies

lib. 3, tit. 2, sec. 7.) I will now briefly pursue the institutions respecting partition, commencing with a. 815, in their order.

The right to demand partition is established in all cases; and no stipulation to the contrary can endure beyond five years. In the events of legal incapacity, or absence, (and these, where the co-heirs are numerous, must be frequent,) or debts, various provisions are made for placing the property under immediate judicial protection. In these cases, and whenever the co-heirs disagree, (apparently also a frequent occurrence,) numerous provisions are made for effecting the partition. Surveyors are appointed, upon whose valuation the court acts. Any of the co-heirs may require his share in kind; but a judicial sale takes place on the requisition either of the creditors, or a majority of the co-heirs, or, if any *real* property will not admit of partition. Various arrangements are then directed as to the divisions of produce, and of the unsold property. In the latter case, the allotments of realty are not to be cut up into minute portions (a. 832). Equality of partition may be effected, either by money or by a rent charge (833). The lots are to be formed either by one of the co-heirs, or by a judicial surveyor. Various regulations are prudently made respecting disagreements, the absence or incapacity of any of the co-heirs, sales by auction, and the title deeds regarding either the whole of the inheritance or any particular lot.

The rules alluded to, which constitute the first section on partition, are followed by others equally complicated, and with a like tendency to litigation, upon what the code calls *Rapports*, (equivalent to our law of *hotchpot*,) or bringing to account property received by any of the co-heirs, under donations *inter vivos*, from the ancestor. They comprise, and it seems unavoidably, no less than twenty-seven distinct enactments, from a. 843 to 869.

The subject of contribution among the co-heirs, for the payment of debts, is next provided for by various regulations, beginning with a. 870. Their mutual remedies, their liabilities, and the different remedies of creditors of the deceased, and of any individual heir, exceed, in complication, our institutions respecting *real* assets, in the exact proportion between an entire and a divided inheritance. Mutual warranties are then given between them (a. 883). The partition also is allowed to be rescinded on grounds of force, fraud, or inadequate value of any allotment, to the extent of a fourth, under different restrictions.

From the foregoing enumeration of the leading regulations on partition of an inheritance, (an event, in the course of nature, much more frequent than a descent to a sole heir,) it is evident, that the heirs under such a system must be almost constantly the victims of surveyors, notaries, and judicial proceedings,—that, in the case of *real* property, the evils will not be confined to the immediate occa-

sion, but must extend themselves to the title, and from the title to the condition of the property. Its vicious effects, too, break out occasionally in other parts of the code. By a. 1220 (on divisible contracts) heirs may recover, or are answerable for those parts only of a debt which they are entitled to, or answerable for, as representing the creditor or debtor. Thus dragging a third person into the embarrassments of a partition which does not concern him; and creating not only fractions of property, but fractions of contracts, and of their consequent actions. But this severance of rights and obligations is subjected, by the next article (1221), to no less than five exceptions, all indeed proper in themselves, but arising out of a vicious system! Sales, with a right of repurchase, (*droit de réméré*) appear by the code to be frequent in France; but, where an inheritance, or a part of it, is the subject, or where either contracting party has left several heirs, the right and the liability to it undergo various modifications, as to the part of each heir (a. 1667-1672).

In fine, at this distance, not so great in space as in habits and modes of thinking, it appears surprising that inheritances, regulated by such laws, can ever survive the process of repeated partitions of their rights and liabilities.

On the other hand, it must be conceded that the system contains only one mode of succession, while the *English* laws ramify into primogeniture for land,

and equal division as to personalty, each administered by distinct rules. This objection, however, is more than counterbalanced by the singleness of character in the real and personal representatives, the heir as to land, and the executor or administrator as to personalty. The latter chiefly represents the deceased in all his transactions. *He* collects the personalty, and out of it satisfies all demands, for which this is the readiest and most suitable fund; and then distributes the residue among the objects of the testator's bounty, or the intestate's next of kin, who, numerous and incapacitated as they must often be, would form an unmanageable body in transactions with strangers. The *Code Civil*, it is true, also authorizes, as has been already noticed, the appointment of an executor; but the duration of his office is limited to a year (a. 1025-1034); nor do the legislators seem to have caught our spirit of the institution. Should the personalty with us prove inadequate to the debts, the heir, (though with a distinction between specialty and simple contract debts, and an exception as to copyhold property, both which are indefensible,) is answerable for the deficiency. Subject to this, he sits (in the domestic phrase of our law) in the seat of his ancestors.

From an ingraftment of good sense on good fortune, the English law appears to possess the germ of a perfect system of succession, with reference to our own constitution and habits. Its benefits, how-

ever, cannot be developed till the present perplexed mode of administering assets, with their distinctions of legal and equitable, their consequent marshalling, and the limited and circuitous liability of lands are removed. Justice, too, will not be done to the next of kin, until the executorship is treated as a mere office, and not as passing the residue, where undisposed of, to a stranger, in preference to the next of kin. Courts of equity have long revolted at this rule of law, and have, as usual corrected it, wherever the individual case afforded evidence of intention to treat the executor as a trustee, by giving him a legacy, or, in the case of a bequest of the residue, which afterwards lapsed by the legatee's death in the testator's lifetime. Here, however, as in many similar cases already noticed, the relief dispensed in particular instances is greatly diminished, if not counterbalanced, by the increase of judicial equity, and equitable distinctions.

I shall conclude with a passing notice of an injurious effect attributed, especially in France, to equal partibility of real property, accompanied by the restriction on testamentary alienation, as contrasted with primogeniture, namely, that it occasions the land to be broken up and occupied in minute portions, to the increase of small and poor proprietors and the diminution of surplus produce. To this it

has been replied, that every co-heir will turn his share to the best advantage ; and where he cannot produce this result by personal occupancy, he will either let or sell. But this is assuming that mankind and, above all, rural proprietors, are exact calculators,—that the attachment to the soil goes for nothing—that all the co-heirs will concur in a sale, or a lease—that a tenant with capital can be readily found. The absence of any of these requisites, and (what in France is equal to an entire want of them,) the propensity rather to personal industry, than to enterprise with capital, must chain the proprietor to the soil. Not to insist, that owners necessarily precede tenants, and, where they become occupants, must take the inheritance as it devolves on them, in small portions, under equal succession ; in large ones under primogeniture. The inference from the preceding remarks is indeed open to great qualifications, many of them arising from local circumstances, of which in England we are but imperfectly informed ; but it may be safely asserted, that the measure of the inheritance must largely *influence* the size of the occupancy.

Since this work was committed to the press, the King of *France*, in opening the session of the legislative bodies, announced an intention of submitting to them the project of a law for a modified introduc-

tion of primogeniture, as applied to landed property. The measure, however, seems pregnant with difficulty. If carried to any material extent, the propounders will have to encounter the lively alarms of a country rendered prone, from past endurances, to confound institutions necessary for the support of a landed aristocracy, with the odious and exclusive privileges enjoyed by its ancient noblesse. Current reports, however, and these somewhat countenanced by expressions in the monarch's address, point at the mere concession to the eldest son of an increased share, namely, *that* disposable by the parent, and subject to his right of disposition. Such an institution, confined to the land, must, in the case of an intestacy, (in which alone it would operate,) multiply its descendible characters ; first, as between the eldest son and the other children ; secondly, as between the real and the personal succession, the latter of which would then be regulated by distinct laws ; and thirdly, as between the co-heirs and the creditors. These effects must materially increase the complication, already excessive, of the present laws of partibility ; and impart to successions every inconvenience, with but a very limited share of the advantages, of the double system of our English succession to real and personal estates. Any measure suited to obviate the opposite objections I have noticed, and, at the same time, to give substantial effect to primogeniture,

would confer no slight benefit on both the social and the political state of France.

The royal address alluded to contains one expression, "*the progressive subdivision of landed property*," which gives portentous weight to an effect already noticed, as imputed to equal partibility; that it tends to divide lands into minute portions, with impoverished proprietors; to multiply useless hands, and to diminish the quantity of surplus produce.

TITLE III.

OF THE RIGHTS OF MARRIAGE.

20.

The husband is entitled to the wife's land during their intermarriage; unless any disposition to the contrary be made under Art. 23 or 24.

21.

If the husband survive the wife, he is entitled as follows: viz., if she leaves issue, to a moiety of the profits of whatever land she may die possessed of, during his life, if any such issue shall so long continue; if she leave no issue, or if such issue shall afterwards fail, then to the land itself, during his life.

22.

If the wife survive the husband, she is entitled to the following proportions of the profits of whatever land he may die possessed of: viz., if he leaves issue, then to one-third part of such profits, during her life, if any such issue

shall so long continue : if he leaves no issue, or if such issue shall afterwards fail, then to a moiety of such profits during her life ; to commence respectively from her husband's death, or from the failure of such issue ; as the case may be.

23.

The husband and wife may make any settlement or agreement, either before or after marriage, respecting their several lands, either present or future, or any interest in them ; subject, however, if made of the husband's land, after marriage, to the laws respecting voluntary instruments.

24.

Any settlement under the preceding article may be made upon, or the land of any person, or the profits thereof, may be given to, the wife, for her exclusive and inalienable enjoyment, during the actual or proposed marriage ; or, where a stranger is the donor, during any future marriage.

25.

Any settlement or other disposition, or agreement, to be made under Art. 23 or 24, or any disposition which the husband may make, either by deed or will, shall not operate in derogation of any rights subsisting under Articles 20, 21, or 22, unless so expressed.

26.

The wife may, during the marriage, dispose of or release her lands, or her interest under Art. 22., either by deed, with the written consent of her husband, or by will ; but, if by deed, the same must be acknowledged by her, as her free act, before a judge of one of his Majesty's courts of record, &c., or before the clerk of the peace of the county where she shall reside ; which officer shall secretly examine her thereon ; and a certificate of such examination shall be endorsed on the instrument so acknowledged, and shall be signed by such officer ; and such certificate may be afterwards registered, pursuant to the regulations in Tit. VIII, with the clerk of the peace for the county where any land affected by the instrument in question lies.

Art. 20. This is our present law,—any benefit arising from a change would be too questionable to warrant the interfering with it.

Although personal estate does not fall within the scope of the present essay, yet this is a suitable place for observing, that the harsh law, which gives *absolutely* to the husband all the wife's personal estate, of whatever magnitude, which she may become *possessed* of during the intermarriage, cries feelingly for correction. The institution originated in ages when personal estate scarcely existed, unless in the shape of agricultural stock and produce, and

household articles. The palliatives introduced by courts of equity, the limited opportunities they possess of exercising their jurisdiction, their subtle refinements to drag the property within it, the fluctuation of their doctrines on the subject, and the consequent uncertainty they introduce into it, combine to introduce an evil nearly as great as what they seek to redress.

Art. 21. Our present law harshly deprives the issue of all benefit from the descent to him of his mother's land, during the father's life, on the one hand; while, on the other, it as capriciously takes it from the surviving husband, whose wife has not borne him a family, in favour of her collateral relations; for whom (as has been already observed) her regard must be comparatively feeble. It does not require precedent to warrant this correction.

Art. 22. Our present law violates the first principle of property, by attaching upon it, in the instance of dower in freehold lands, an indefeasible right upon all the lands which the husband may possess, during the marriage, in favour of a third person. His surviving right is not a parallel case; since the wife cannot aliene without his concurrence.

A close approximation to the proposed law appears in the usual custom of copyholds, which confines her dower or freebench to whatever lands of that tenure he may *die* possessed of; not having devised it away, through the medium of a surren-

der to the use of his will; as this is considered to overreach his seisin at his death.

The leading operation of the proposed alteration is an act of justice. A secondary, though far from inconsiderable effect will be, to render needless all the complicated and expensive forms, now practised, to prevent dower from attaching the instant the land is acquired : as described at large in Part I., Tit. 4., chap. iii., sect. 1 and 3, and to enable a purchaser to take, and again to aliene his own absolute property, by a simple conveyance. The contrast between this and the present modes of conveyance, by appointment, and lease and release ; or by fine, with a declaration of use, will best appear by the forms No. 1. in the Appendix.

An exact precedent for the distinction between the event of the husband leaving issue, or not, may be found in our present law for the distribution of an intestate's personalty ; which allows the wife to take only one-third part, while sharing with the husband's issue ; but a moiety in conjunction with his collateral kindred.

Art. 21, 22. It will be observed that, instead of dividing the *land*, I give throughout an equivalent in its *profits*. I have shewn myself ever averse to divided interests in land ; but, when compelled to it, I prefer leaving the land in the hands of the persons most interested in its good management ; and this maxim has guided me in framing these

two articles. I appeal to every practised person as to the mischiefs which land sustained from a divided ownership. In the instance of a wife dying before her husband, leaving issue, which afterwards becomes extinct, there may appear too frequent a change of temporary ownership, by the possession passing from the husband to the lineal heir, and then returning. But this could not be arranged otherwise without some violation of principle ; and, in fact, the possession will probably continue with the husband on behalf of the issue.

Art. 24 supersedes the necessity of trustees for protecting the wife in what she actually enjoys at present in equity in her own name, and might do equally so at law, by rendering her a feme sole as to her separate rights.

Art. 25 is levelled at our present equitable doctrine of *implied* satisfaction. Its numerous distinctions, and nice refinements, produce the certain evil of a large mass of *active* law ; while the balancing of contradictory expressions and equivocal facts, often renders it questionable whether the intention be not rather defeated than aided by the application of the rule. In short, it deserves serious consideration whether the law had not better be restored to its ancient limit of *express condition*, with the sole exception of double portions to children, which stand upon a distinct ground.

Art. 26 has a threefold advantage. It super-

sedes the circuitous and expensive process of a fine, now necessary wherever a disposition is intended of the wife's lands not settled to her separate disposal. It renders needless all such settlements in future, with the power and consequent appointment, whereby the object is at present effected; and thus greatly diminishes this highly technical mode of disposition; which, in principle, is applicable only where a person, not being an owner, disposes of an interest in the property of another. And, lastly, it gives uniformity to every description of disposition by married women, and places a guard, which is now wanting, against their feebleness, where their power of appointment is exercisable *by deed*.

For this alteration, precedents, were they needed, are to be found, both in the existing mode of transferring copyholds on the part of married women, by surrender, with a private examination; and in the right to convey freehold by deed, which is given to them, or their husbands on their behalf, by most of our *local* acts. In a recent instance, too, of a public nature, married women, being insolvent debtors, are authorized by 3 Geo. IV. c. 123. s. 12. to convey their real property by mere deed to the provisional assignee. The partial amendments, however, which are constantly taking place of a bad law, in every case of convenience or commiseration, are forming fast, in their number

and variety, a grievance equal to that which they are meant to remedy.

The advantages in point of simplicity, and consequent brevity, of title, to be derived from the *direct* operations of arts. 22, 24, 26, are in themselves very considerable.

TITLE IV.

OF ALIENATION BY DEED OR WILL.

27.

ALL persons aged twenty-one years or more, and not under any mental or criminal incapacity, may aliene their lands, or any interest therein, whether immediate or future, certain, or contingent; or may charge the same, either by deed or will; subject to the regulations hereafter imposed; and also subject, as to any alienation on the part of wives, by deed, to the regulations in Art. 26.

CHAP. I.—Regulations peculiar to Deeds.

Sect. 1.—Of the Formalities attendant on Deeds.

28.

Every deed shall be written in words at length, either on parchment, or vellum, or paper, and shall be signed at the foot of it by each contracting and consenting party, with his christian and surname, after his usual manner of writing the same; or, where a party is unable, from any cause, to write, then with his mark, against which the

witness present shall, by the direction of such party, write "the mark of" such a one, stating the party's christian and sur-names; and the party so signing, or directing the signing of such deed, shall thereupon declare the same to be his deed, which signature, or the acknowledgment thereof, and declaration, shall be deemed the execution of the deed; and the execution thereof, by each party, shall be attested by one witness capable of writing, who shall thereupon sign a note of such attestation, to be written under, or endorsed upon such deed, with his name, residence, and station in life. Where any party executing shall affix his mark, the note of attestation of his execution shall also state the person counterwriting the same by his direction. The law declares any further solemnity in the executing or attesting of deeds to be unnecessary.

The preceding article is framed in conformity to the general habits of the country in executing and attesting deeds, with the exception of sealing; a practice of feudal and illiterate ages, but now become an idle ceremony, from the better substitute of signing. Its omission is sanctioned by the statute of frauds, which requires wills to be signed only. *Declaring* is now a more appropriate term than *delivering*, which is an allusion to the corporal tradition of fiefs. Besides, it reduces this act to one and the same expression, as to both deeds and wills.

It attests the good faith of our age and country,

that, in practice, one witness is deemed sufficient to a deed. As this, however, is now for the first time so declared, the addition of his residence and station, with the further precaution taken, on an execution by an illiterate party, are deemed advisable. The concluding sentence is added merely to prevent cavil, should more witnesses than one attest the execution.

Sect. 2. *Of the different Characters of Deeds.*

29.

Every deed transmitting land, or any partial estate therein, except terms for years, is termed "a conveyance," and shall operate for that purpose by the word "convey."

30.

Every deed transmitting land to persons in succession, whether charged or not thereby with any yearly or capital sum, is termed "a settlement," and shall operate for that purpose, and transmit the legal incidents hereafter given under Art. 44, 45, and 46, by the words "convey and settle."

31.

Every deed charging lands, or any partial estate therein, with any yearly or capital sum of money, or

pledging it for the performance of, or as an indemnity against, any collateral act, is termed "a charge," and shall operate for that purpose, and transmit the respective legal incidents hereafter given under chap. 4 of the present title.

32.

Every deed transferring to a stranger any subsisting charge upon land, or any subsisting term of years, or other interest constituting personal estate therein, is termed "an assignment," and shall operate for that purpose by the word "assign."

33.

Every deed, discharging the owner of the land from any term of life or years, or any charge or lien, or relinquishing any contested right or claim, either to such owner, or to any other claiming an interest in opposition to such right or claim, is termed "a release," and shall operate by that word.

Our present terms of conveyancing are applicable to systems, or to fictions, which are all proposed to be swept away; and their names should perish with them. Every transmission of land; or of a direct estate in it, whether on sale, settlement, gift, or otherwise, is, in principle, a conveyance. A settlement, however, has peculiarities which require for it a distinct denomination. A mortgage

or other incumbrance, though now effected by a conveyance or a demise of the estate, and therefore disguised under such name, is, in effect, only a charge. A lien or a term, when once created, is in itself something distinct from the land, and is also transmissible to a different class of representatives. For these reasons, I have thought proper to preserve to any transfer of it the distinct term of assignment, already conferred by our present law. Finally, whenever partial estates, or charges, or disputed rights, are relinquished to the owner of the soil, or to an adverse claimant, with a view to extinguishment, all such dispositions bear a character distinct from any of the preceding assurances, but allied among themselves from the mode of their operation, and are therefore classed under one common term of release.

The foregoing, however, are not presented as the only essential varieties of deeds; but merely to exhibit the defined character and phrase which each class of them should assume. These should be pursued through every distinction of a substantial description.

Sect. 3.—Of the Time from which Deeds shall take Effect.

34.

Every deed, whether for a binding consideration, or voluntary, is conclusive, from the period of its date, upon the party executing it, or accepting or acting upon any disposition therein contained.

CHAP. II.—Regulations peculiar to Wills.

Sect. 1.—Of the Formalities attendant on Wills.

35.

Every will, of or concerning land, shall be written in words at length, or, as to numbers, in figures, either on vellum, parchment, or paper; and shall be signed at the foot of it by the testator, with his christian and sur-names, after his usual manner of writing them; or, where he is unable, from any cause, to write, then with his mark; against which one of the witnesses present shall, by the testator's direction, write "the mark of" such a one, stating the testator's christian and surnames. And the testator shall thereupon declare the same to be his last

will; which signature, or the acknowledgment thereof, and declaration, shall be deemed the execution of the will. And such execution shall be attested by two witnesses, who shall thereupon sign a note of such attestation, to be written under the will, with their names, residences, and stations in life. Where a testator shall affix his mark, the note of attestation shall also state the person counter-writing the same by his direction. The law declares any further solemnity in the executing or attesting of wills to be unnecessary.

The preceding regulations are equally applicable to codicils of or concerning land.

On the present law, requiring wills of freehold land to be attested and subscribed by three or four witnesses, in the presence of the testator, it has been frequently remarked, that more good wills have been spoilt by it than bad ones prevented. The fact is, that in the case (happily so rare in this country) of a will obtained by fraud or force, the formalities are carefully observed. Negligence is usually attendant on good faith; which, the less it is exposed to its consequences by embarrassing formalities, the better. For publicity, two witnesses are as good as three; while the recommendations on the grounds of convenience, and their being the greatest number usually resorted to in other transactions, are great. The statutory check, too, of the witnesses subscribing in the

testator's presence, has been much diluted by legal decision. In one case, it was held to be satisfied by an attestation in another room, seven yards distant, where there was a broken window, through which a testator *might* see the witnesses. In another instance, by the facts, that the testatrix executed in her carriage, which was opposite the window of the attorney's office, where the witnesses took the will and attested ; but so (as was deposed) that she might see what passed. And in a third, by the witnesses subscribing in a room where the testator was ill in bed, with the curtains closed. These strange refinements, forced by a desire to give effect to the clear intent, show the worse than uselessness of the rule. The greatest protection that can be afforded to wills by legal formalities, is to assimilate them as much as possible to those adopted on other occasions ; which I have sought to do, by identifying them with those attendant on the execution of deeds ; with the single additional guard of a second witness. To show that even this is rather in deference to an existing law, I need only add, that a will of copyhold requires no witness ; and that a will of personal estate, disposing of hundreds of thousands, requires no *subscribing* witness ; but may be established by any extrinsic testimony of belief of the handwriting. And yet, in neither of these instances do we find fraud attendant upon the want of a numerous train of attesting witnesses, whose subscription in the tes-

tator's presence has, from an urgent sense of justice, been often reduced from a fact to a bare possibility.

Sect. 2. Of the Time from which Wills shall take Effect.

36.

Every will of or respecting land shall take effect from the death of the testator. It may dispose of whatever land, or interest in land, whether immediate or future, certain or contingent, he may die entitled to ; nor shall its dispositions be affected by any intermediate charge upon the land devised, or other alteration in the extent or mode of his interest therein, beyond the operation of such charge or other alteration.

The enabling testators to pass whatever lands they may have at their deaths, instead of confining their devises to lands belonging to them at the date of the will, (for which alteration the testamentary power over personal estate is a direct precedent,) not only enlarges the faculty of devising ; but will also, with the reduction subsequently proposed by Art. 37, of all interests in land to legal estates, prevent the numerous questions now constantly occurring, (as already noticed,) upon the revocation, either total or partial, of de-

vises of lands, by the subsequent alteration of a testator's interest in them; and also upon the effect of a codicil, as a republication of the will, to include after-purchased lands.

CHAP. III.—*Regulations common to Deeds and Wills.*

Sect. 1. *Of Dispositions Absolute and Partial.*

37.

All dispositions of or respecting land, whether immediate or future, and whether the event be certain or contingent, are placed equally under the protection of the laws; and are incapable of being affected by the act of any third person, having either the possession or any ulterior interest.

38.

All dispositions of or respecting land, shall be made to the alienee, and not to any other person to the use of or in trust for him; and all estates and interests in land shall be deemed legal rights, cognizable in the courts of law.

39.

But the preceding article shall not prevent the vesting land, or the profits thereof, or any interest in, or charge

upon the same, in any person, for active purposes, whether of disposition, management or application, within the limits of Articles 42, 43, 44; and in such cases the property so intrusted shall be deemed absolutely to belong to the trustee, who shall be answerable, in respect thereof, under the subsequent title of Trusts.

Art. 37. This article, like many others, is introduced, not so much from its intrinsic necessity, as to prevent all attempts, and, by degrees, cause to be forgotten, the practice, originating in tenures, of defeating future interests; either for the want of a particular estate to support them; or by the destruction of contingent remainders, &c.

Art. 38. This, too, has caution for its object, rather than necessity; since the practice prohibited could only be effected by means of uses and passive trusts, both which are proposed to be abolished.

40.

Land may be aliened in perpetuity, either absolute, or defeasible upon the happening of any event within the limits of Articles 42, 43, 44, 45.

41.

In alienations in perpetuity it is not necessary to name the heirs or assigns of the alienee. Their interest emanates from his.

Art. 41. This article will, doubtless, startle my readers ; but I entreat a momentary patience. The necessity for naming the heirs of the donee, in order to pass the inheritance, was unknown in the Roman laws ; nor do we find traces of the practice even among the institutions of their immediate conquerors. See *Marcuff. Formul. in Lindenbrog—Cod. Antiq.* especially 52, 55, 62, 64 ; in the two latter of which, land and moveables are given in the same sentence, without any distinction ; also 127, 130, being absolute sales, the one of a farm, and the other of a piece of land, without mention of heirs or alienees. Under both the above systems of policy, our present distinction was completely inverted ; the usufruct or benefice, which formed a mere life interest, being defined as such ; while the perpetuity was designated by the *nomen*, or mere mention of the property. That the same practice prevailed in this country also, before the introduction of fiefs by the Normans, may be collected from the *Charters* of gifts, chiefly testamentary, collected at the end of Lye's *Anglosaxon Dictionary*, where the gift is to the individual simply ; while the life-interest is defined in its duration. Were the inquiry pursued further, this, being the natural mode of distinction, would be found to pervade every description of charters not influenced by tenures.

The necessity for naming the heirs in the charter, in order to pass the fee, originated in subsequent

periods, when invading chiefs, and afterwards the rulers of Gothic dynasties, granted lands under condition of military service, which constituted what was called feudal tenure. These, as has been frequently stated, were originally made to the feudatory for life, being in respect of personal services, and were only gradually extended to his heirs, on the same terms. (a) Whenever they were not specially named, the grant was taken in its primitive sense. Although the feudatories have long become absolute proprietors, still with us the distinction has been constantly preserved in deeds; but, in wills, it was found as constantly to defeat the testator's intention. To remedy this, a testamentary fee was held to pass, either by words of inheritance, or by expressions tantamount, as has been already observed; (Part I. tit. iv. chap. 5.) and numerous distinctions (in themselves an evil) have been introduced for this purpose. The word *estate* has been most frequently taken advantage of, as denoting an intention to pass all the testator's interest in the land, as well as the land itself. But ask a testator, unversed in legal lore, the distinction between "my *farm* at A." and "my *estate* at A." He would seek it in vain. Generally speaking," observed Lord *Mansfield*, (Cowp. 299) "no common person has the smallest idea of any difference between giving a horse and a quantity of land."

(a) See MONTESQ. *Esprit des Lois*. L. 36. c. 7, 8.

It has been judicially remarked, that no questions of this description arise upon *deeds*; and that, therefore, the rigid rule had better be adhered to, in wills as well as deeds. This, indeed, would cut the knot; but at the price of frustrating the intention. In adopting the reverse rule, we should avoid all fine-spun distinctions in support of a testator's meaning.—The same words would have the same meaning, both in deeds and wills—They could receive the ordinary exposition of language and intention; where, whatever is simple is absolute; and the mere expression of the thing given is surely as forcible as any auxiliary terms; the use of which ever implies a feebleness of language.—We should be supported also by the examples already noticed of the civil law, where the *usufruct* only is specified, but the *nomen*, or property, passes by the mere expression of the thing; and of the earlier spoilers of the Roman empire, among whom the adjuncts in question were unknown.

If domestic precedents are required, we may advert, first, to the partial one of powers conferred even by deed, as noticed in Part I. tit. iv. ch. iii. s. 6. n. 4., where the expressions “estate—manner,” &c., have been held equivalent to words of inheritance, for authorizing a gift of the fee. But, on a much larger scale, we may view the numerous cases already decided, and which still constantly occur, on wills, where the intention to pass a fee is always clear; but the struggle is, to give that

construction effect, without directly violating the feudal rule, which still governs deeds. Were mere common sense to decide on the mention or the omission of the classes taking derivatively under the grantee, surely his alienee is entitled to equal protection with his heir; and yet, although from a redundancy of expression, land is usually conveyed to one, his heirs and *assigns*, yet the necessity for naming the latter has never been contended for. Should they be omitted by any accident, they are included, it is said, in the grantee, and his legal right of alienation. The same might be equally affirmed of heirs, and the right of descent. A contrary doctrine would be repugnant to our sensible, though quaint legal maxim.—*Additio probat minoritatem.* (a)

(a) *Co Lit.* 189. Note (a) *Wingate Max.* 60. The latter writer gives the following curious exposition of this maxim. “When you finde it said in any book, that a man is seised in fee without saying more, it shall be understood in fee-simple; and not in fee-taile, unlesse there be put unto it such an addition, Fee-taile, &c. And, therefore, in Heraldry, the younger sonnes give the differences. And in France, by *Monsieur* (without any addition or other title,) is to be understood the king’s onely brother, and by *Madame*, (without more) the king’s onely sister; and, therefore, they are said in French to be *Monsieur sans queüe*, and *Madame sans queüe*, viz., without any other addition or title. But if there be in France any occasion of naming any other Lord or Lady, they are always named with their proper and peculiar title, as *Monsieur de Longville*, *Madame de Chevreuse*, &c.”

Surely an absolute perpetuity may claim, with us, the privilege of passing *sans queüe*.

42.

Land, or any profits thereof, may be aliened to any person for his own life, or for the joint lives of himself and any other person or persons. It may also be aliened to more persons than one, either jointly or successively, for their respective lives, or for the joint lives of themselves and any other person or persons; all such persons, whether alienees or nominees, being in existence at the date of the instrument, if a deed; or if a will, at the death of the testator.

43.

Land, or any profits thereof, may be aliened, either in possession, or to take effect in the death of the donor, or of any third person, who may actually have, or may acquire, life-interests therein, either by prior title, or under the preceding article, to any person or class of persons who may be living, or be conceived, when the disposition shall vest in possession. Any such interests may either be absolute, or be rendered defeasible, if the donee or donees shall die under the age of twenty-one years; or on the happening of any other event before his or their attaining that age; or with reference to whom any event shall or shall not happen before that period.

44.

Alternative dispositions are also allowed of land, to take effect if any limitations under the preceding article

shall fail to vest absolutely; but all remainders and other dispositions expectant upon or to take place after the absolute vesting of any such preceding limitations, or beyond the period within which the same are confined, or upon any event more remote than what the preceding article authorizes, are utterly void.

Arts. 42, 43, 44. These are intended to embody, and give certainty to the principles of our present laws of settlements, or restrictions upon alienation, both as to lands and to profits, and to give one uniform set of rules for both. The different characters and defects of settlement by entail, and settlement by springing use, or executory devise, have been already described in Part. I. tit. iii. c. 2. The former are proposed to be utterly abolished. The power, under the latter, of protracting alienation by means of mere nominees, unconnected with the estate, is prevented by Art. 42, which regulates the disposition of life-interests, and Art. 43, which confines all present or future interests within the *true* limits of our present law of executory dispositions. A precedent for this article, in principle, though not carried to the actual extent, nor in all respects so guarded, may be found in the act of 40 Geo. III. c. 98, respecting accumulations, the substance of which has been already stated in the above chapter. The period of twenty-one years after a life, or lives in being, allowed by the defective terms of our present rule, as a provision

against a minority, but abused by being rendered an absolute term for the mere purpose of procrastination, no longer appears; nor is it necessary, since the event of infancy is *directly* provided for, by dispositions being rendered defeasible, and substitutional ones allowed, during that period.

Art. 44 regards both remainders and executory dispositions, as they are now severally termed. Estates tail, indeed, being abolished, regular remainders, after estates of inheritance, can no longer subsist; but here, as well as elsewhere, the phrase is introduced to encounter abuses founded on established distinctions. By alternative dispositions are meant, as well concurrent limitations, in our present law called contingencies with a double aspect; as to A for life, and then to B, if he survives A, if not, to C, as also consecutive limitations, of which the former is defeasible, within a lawful term, in favour of the latter; as, after the death of A, to such son of his as shall first or alone attain the age of twenty-one; but if there shall be no such son, then to B, and his issue, in like manner. These limitations may be repeated to any number of donees in existence, and their respective issue; observing the rule, that the land must vest absolutely in any issue unborn when the instrument takes effect, on its attaining twenty-one; and thus all the subsequent limitations will be defeated.

In conclusion, the three articles united will be found to effect a course of settlement combining

the substantial effects of entail, in its substitutary limitations to a second class of takers, if no issue of the first tenant for life acquires the absolute ownership, with the simplicity of interests to which our present executory dispositions are restricted ; and avoiding, on the one hand, the peculiarity of estate, the numerous fictions, the expense, and the protraction of title attendant upon entails ; and, on the other hand, the undue postponement of alienability, practicable by the insertion of mere nominees, under the defective terms of our present rule of executory limitations.

It is open to observation, indeed, that, under settlements effected by limiting successive *estates tail* to the issue, an indirect effect is often produced, of preserving the estate in the family, from the necessity which exists for the father's concurrence with the son in suffering a recovery, whenever the latter wishes to cut off the entail, in his father's lifetime. The father frequently avails himself of this occasion, to stipulate for the estate being resettled. The same object, however, could not be effected under the preceding Art. 43, 44, as they at present stand ; since the eldest son, on attaining twenty-one, would acquire the absolute property, subject to his father's life-interest ; and all the subsequent limitations would become void. The effect in question, however, might still be preserved, if thought desirable, by an enactment that, during the father's lifetime, the expectant

estate shall not be alienable or extendible, unless with the father's concurrence, or on marriage; but be descendible only. This, in the event of the eldest son dying unmarried in the father's lifetime, would give the property, on the son's death, to the brothers and sisters, in the character of heirs. The father's life-interest by descent would be merely a repetition of that already given him by the settlement. The only objection to be urged against the proposed institution is, that it may indirectly protract the period of alienability for a second generation: but the replies are, that the son is free, either to accede to, or reject, the arrangement—that ordinarily, in forming it, the wants of every part of the family, whether payment of debts, increased provision for younger children, necessary sales, exchanges, or purchases, in short, whatever absolute proprietors would rationally achieve, are duly weighed and provided for. Finally, to ensure success, we must often propose, not what may be best, but what is most practicable; and it can scarcely be expected that legislators, who are, to a large extent, land-owners, and frequently fathers, would voluntarily relinquish a power they have hitherto possessed, and are conscious of its being generally used for the welfare of families. As the law, however, recognises the right of an adult son to marry, it should not restrain him in the means of doing so.

In point of policy, and for the desirable object of uniformity, *the accumulation of rents and profits* may be safely extended to the extreme limits of Arts. 42, 43, 44. Indeed, these scarcely exceed what are allowed by 40 Geo. III. c. 98; while by prescribing the same rule for profits and capital, they correct a striking anomaly. In a political point of view, the accumulation of capital within reasonable bounds (and as such I would instance those proposed) is anything but an evil.

Sect. 2.—*Of legal Incidents to partial Estates.*

45.

Wherever any settlement of land shall not contain a power of selling, or of exchanging, or (where an individual share is settled) of making partition, it shall be lawful for the Chairman of the Court of Quarter Session for the county where the land is situate, on the summary petition of any tenant for life in possession, with a subsequent limitation to his or her issue, or of the guardian of any issue, entitled, either absolutely or presumptively, in possession to the land, to order any such land to be sold; or, to be exchanged for other land; or, where the settled property consists of an undivided share, to order, as far as regards such share, a partition to be made of the entirety; and, upon every such occasion, to authorize the

petitioner to convey the settled property accordingly. In the event of an exchange, or a partition, such chairman may direct any money to be either received or paid, for equality of exchange, or partition ; and, in the latter case, to be raised by sale or mortgage of any land to be thereupon taken.

All monies to arise from any sale, or to be received for equality, upon any exchange or partition which may be severally made under this article, shall be paid to the Clerk of the Peace for the county where the land so disposed of lies ; who shall give the purchaser an acquittance for the same, and shall keep a distinct account thereof ; and all such money shall, under the direction of such chairman as aforesaid, upon the summary petition of such tenant in possession, or such guardian as aforesaid, be applied, in the first instance, in discharging any incumbrances affecting the lands in settlement, or to be acquired under this article ; and then in the purchase of other lands. In the interim, such money shall be invested under such direction, and upon any such petition as aforesaid, in the name of the said Clerk of the Peace, upon a distinct account, at interest, upon public or real securities, to be varied, if thought expedient, in like manner ; and the produce thereof shall belong to the person who would be entitled to the profits of the land next directed to be purchased and settled, if such direction were actually complied with.

Finally, all lands to be purchased, or to be acquired in exchange, or on partition as aforesaid, shall be conveyed and settled, under the direction of such chairman as aforesaid, to such persons, and for and in such estates, and manner, as the land to be sold or exchanged, or the share to be thrown into partition, would then stand settled, if such sale, exchange, or partition had not taken place.

46.

Wherever any settlement of land does not contain a power of leasing, such tenant for life in possession, with any subsequent limitation to his or her issue, and such guardian, as are severally expressed in Art. 45, may lease, or, if the settled property consists of an undivided share, may concur, in respect of such share, in leasing, as follows; viz.:

1. Land for agricultural purposes, for any term not exceeding sixteen years.

2. Land for building, for any term not exceeding ninety-nine years.

3. Buildings for effecting substantial repairs, for any term not exceeding thirty-one years.

All such leases must commence in possession, or from a past period, and be granted at rackrents, without any indirect benefit to the lessor. The acceptance of the lease shall be deemed to produce, on the tenant's part, the different obligations and liabilities to all persons in-

terested in the reversion, to which a lease by an absolute owner is afterwards subjected by Art. 51.

47.

Any individual tenant for life in possession of land, or of an undivided share of land, may lease, or concur, in respect of such share, in leasing the same land, for agricultural purposes, for any term not exceeding seven years; to commence in possession, and to be granted at rackrent, without any indirect benefit to the lessor. The acceptance of the lease shall be deemed to produce, on the tenant's part, the different obligations and liabilities, to all persons interested in the reversion, to which a lease by an absolute owner is afterwards subjected by Art. 51.

48.

All persons and corporations, whether sole or aggregate, for ecclesiastical, collegiate, or charitable purposes, except parsons and vicars, may lease lands to which they are entitled in possession, in right of their respective churches and other establishments, under the restrictions and with the consequences expressed in Art. 46, with reference to the individuals having partial estates therein described.

Arts. 45, 46, 47.—The necessity for the exercise of occasional acts of ownership, while estates are under settlement, has been already explained in the preliminary chapter on *Powers*, in Part. I.

tit. iv. c. 3. s. 6. Under the same head are exhibited many of the technical niceties which surround and imperil both the form and the substance of their execution. To meet this necessity,—to give one fixed mode of executing the requisite acts,—to dispense with the endless repetition of lengthy forms,—above all, to instruct the public in the characters, and the extent of the faculties of ownership, usually and necessarily attendant on settled property, and in the checks requisite to prevent their abuse, are the objects of the three preceding articles.

A precedent is to be found for an easy and summary exercise by commissioners of legal powers of partition and exchange, in the case of allotments under enclosure acts, and in the functions given to the commissioners, by the general enclosure act of 41 Geo. III. chap. 109. sect. 16; as may one for investing tenants for life with powers of leasing, in the instance of the powers given for this purpose, to ecclesiastical persons, by the different statutes of Hen. VIII. and Elizabeth. These legislative authorities relieve the preceding articles from the charge of total innovation, and render them merely extensions of and improvements upon existing institutions.

I have confined the powers in question to those cases where the settlors have not themselves conferred any; leaving them at liberty to do so, if they prefer it; but in full confidence, that legal pro-

visions on these heads, when carefully settled, and generally known, will be preferred to any conventional ones. There is, in truth, no good reason, why all the attendant qualities of an estate should not be equally as much defined as the estate itself. I shall now proceed with some individual remarks on each of the powers proposed.

Art. 45. The chief novelty in this article consists in conferring the power on the Chairman of the Court of Quarter Sessions for the county where the land lies. The country is much in want of local jurisdictions, in cases of real property, for purposes of authenticating legal transactions, as descents and wills; and of exercising functions of ownership, where the title is not in question, promptly and at a reasonable expense, on behalf of parties incapacitated or non-existent. It has, indeed, already declared and met this want in the instance, more than once alluded to, of the powers of partition and exchange, given to the commissioners by the general enclosure act.

To those practically conversant in the execution of the powers in question, it is notorious, that private trustees are selected, more from family connexion, than personal capacity,—that they often, either from weakness, grant improper indulgences to the tenant for life, for which they are sometimes made personally answerable, (and thus occasion the thankless office to be undertaken with reluctance;) or else, from extreme caution, they employ their

own lawyers, and thus, on the other hand, occasion to the transaction additional expense and delay;—that sometimes, (as in a recent flagrant case) they misapply the trust money,—that, either from death, old age, or other cause, they are often removed before their functions come into activity, in which case, either successors are to be sought for and appointed with difficulty and expense; or, if their appointment is not specially provided for by the settlement, it is to be effected through the tedious and expensive medium of the Court of Chancery, or even of an Act of Parliament.

To obviate these various objections, I have substituted the court of Quarter Sessions, as a tribunal already established for criminal and municipal purposes; and capable of being expanded into a civil court, for functions of a secondary and ministerial character; if (a project thrown out, more than once of late, for other objects) a barrister of reputation were established, as standing chairman, in every county. I have availed myself also of the Clerk of the Peace, an established officer, to invest him with the character of an Accountant General to the court; and, with a view to the utmost occurrence and despatch, I have proposed all the proceedings to be summary; as in the case of exchanges and partitions under the general enclosure act.

Art. 46. The period, for which leases are usually empowered to be granted is twenty-one years.

I am, however, well informed, that this is a longer time than is requisite, under ordinary circumstances, in agricultural leases, to make a suitable return to any tenant for an outlay ; and that sixteen years are amply sufficient for this purpose. This is, therefore, presented as a mere point for discussion. It will also require consideration, whether a lease should not be made to commence forward, at any usual period of entry in the same year ; as at Michaelmas, when executed in May ; also, whether some provisions should not be made for off-going tenants.

The other provisions of this article, though numerous, are so thoroughly after the established forms, as to need no particular comment.

Art. 47. Where the land is not limited to the issue of the tenant for life, he can feel no interest in the preservation of the inheritance. In this case, therefore, I have merely authorized him to charge it with such a lease as is requisite to assure to a tenant his return for the ordinary expenses of cultivation.

Art. 48. Is thrown in merely by way of suggestion as to leases of church lands. The chief of these are regulated (as briefly intimated in Part. I. tit. iv. ch. 3. sec. 6. n. 4.) by laws the most complicated, irregular, and impolitic ; converting the property capriciously, namely, where it happens to have been *anciently* leased out, from an ascertainable income into a lottery, in which, with a view to a

high fine on renewal, the incumbent stakes his life against the term of the lease, and his purse against that of the lessee. Should he win, his successor is impoverished; should he lose, it is to the prejudice of his family or his creditors. The practice, from its impolicy, is nearly discontinued in the estates of private individuals. In the present suggestions, the periods and terms of leasing combine the enjoyment of the revenues with the improvement of the property. To meet existing leases, it is proposed, to let all beneficial leases of church lands fall in, before Art. 48 begins to operate, and this will be effected by confining the power to beneficiaries entitled *in possession*.

49.

A third person may voluntarily give a messuage and any quantity of land suitable to be held therewith, for the inalienable personal residence of the donee during his life, or any less period. If the donee relinquishes the possession, either voluntarily, or under any alleged legal lien, or act in law, his interest ceases.

50.

A third person may voluntarily charge land with any yearly rent not exceeding 100l. per annum during the life of the donee, or for any less period; to be either paid to the donee, or to be applied, at the discretion of another.

for his personal maintenance, and to be exempt from his debts and other legal liabilities.

Arts. 49, 50. Our present law allows land, or a rent-charge, to be settled upon an individual for his life, or any less period. It seems expedient to confine this right :—first, to a voluntary settlement, in order that individuals may not settle their own lands, or lay out their own money, so as to subtract property from the rights of creditors, even of third persons ; and next to a personal residence for the donee, or to a rent-charge of a limited amount, as these restrictions fully embrace the objects of a home or a maintenance. The amount of the rent-charge is inserted merely as a matter for discussion.

51.

Land may be leased for any term, not exceeding twenty-one years, for any purpose whatever. It may be leased for erecting houses or other buildings, or any houses or other buildings may be leased for repairing or re-erecting, for any term, not exceeding ninety-nine years ; every such term to be accounted from the date of the lease, or from a period within six calendar months therefrom, if in possession ; or, if in reversion, from such period as, with the then residue of the existing lease, will complete the entire term authorized. No longer term of years can be granted or created, by any assurance, for any purpose whatever.

All leases under this article shall be deemed, unless otherwise expressed, to produce the following covenants and liabilities on the lessee's part, viz., to pay the rent reserved, and the taxes and rates imposed—to keep and leave the premises, and all essential protections thereof, in repair; being assigned timber and stone in the rough for that purpose, if to be found on the premises—to allow the lessor and his agents, from time to time, to enter and view the state of the repairs, and to give or leave notice in writing to the lessee, or at his usual or last known place of abode, of any defect therein; and (the lessee) to repair the same accordingly within a reasonable time, to be prescribed therein for that purpose—to use and cultivate the land in a husbandlike manner, according to the custom of the country—also that, whenever the rent is unpaid, the lessor may levy the same by distraining any goods on the premises, and selling the distress according to the law in civil cases (a)—that the lessor may avoid the lease and re-enter, if the rent shall be unpaid for six months or more; or if the lessee, on having such notice in writing as aforesaid to put the premises or any essential protections thereof in repair, shall not duly repair the same accordingly, within three months then next—or if he shall not cultivate the land in manner aforesaid.

(a) The mode of distraining and selling, being rather a matter of remedy than of right, would be out of its place here. The common and the statute law, however, on the subject, require to be thrown into one general institution.

52.

Mines and quarries, with a suitable quantity of the surface, may be granted for such period as shall be necessary for working, converting, and disposing of the same.

All such grants shall be deemed, unless where otherwise expressed, to produce the following covenants and liabilities on the lessee's part, viz., to pay the rents or royalties reserved, and the taxes and rates imposed—to work the mines or quarries in a skilful manner, and to the best advantage—to allow the lessor or his agents, at all times, with the assistance of the lessee's machinery and workmen, to enter and view the mines and workings, and to take accounts thereof, and to inspect the lessee's books and accounts for that purpose—also, at the determination of any grant of mines, to fill in or arch over the pits, and render the surface fit for cultivation. That if, and as often as, the rents or royalties shall be unpaid for twenty-one days or more, the engines and machinery, and also any minerals or fossils won and placed on the premises, may be distrained and sold by the lessor, as in cases of distress for rent of land in arrear—also, that the lessor may avoid the lease and re-enter, if the rents or royalties shall be unpaid for six months or more; or if the works shall not be conducted in a skilful manner, and to the best advantage.

51. The periods within which leases are proposed to be confined, (with the exception of mining grants, which regulate themselves,) are such as the esta-

blished habits of this country have prescribed, for rendering a suitable return to the farmer or the builder. All further terms have been introduced for indirect purposes, to evade the laws of tenure or mortmain. As the former will be abolished, and terms now afford no protection against the penalties of mortmain, it is thought advisable to prevent the effect of technical habits, or any attempts to infringe the simplicity of the proposed code, by expressly negating the creation of more extensive terms.

It will be seen that, in the effects I have attributed on the tenants' parts to leases, I have again had recourse to *legal incidents*, where the parties choose to adopt the regulations of the law. The motives I have already enlarged upon, of certainty, brevity, and public information, need only be alluded to here. It should, however, be intimated, that the actual provisions of the two preceding articles are not presented as complete ; but rather as matters for discussion. To render them exact, requires the united tact of the farmer, the builder, the miner, and the lawyer. The *Code Civil* is ample upon the general subject of *surface* leases ; and, notwithstanding the difference of habits in the towns, and of climate and culture in the country of *France*, much pleasing and interesting information may be derived from it. The subject commences at Art. 1714, with regulations common to buildings and farms, and is afterwards subdivided between these two species of property, Art. 1752—1763.

In general, they are excellent ; yet, in order to inculcate the great principle of certainty in legislation, I must enter my protest against the vagueness, and the consequent tendency to litigation, of Art. 1769, which provides for the reimbursement of a farmer possessed of a lease for several years, who loses accidentally a moiety or more of his crops, by allowing him, at the end of his term, an abatement from his rent, unless indemnified by previous crops. How many questions of fact, all to be tried by a legal tribunal, here present themselves : the quantum of the crop, and the loss, and of all the previous crops ; the fact of the loss being by pure accident, not by negligence or design ! With a rule so lax, so pregnant with litigation, the parties concerned would, in policy, renounce its benefit, and bargain for themselves. But that must surely be a bad law, which the public, instead of adopting, guards against by previous stipulation. How preferable is our simple course, of requiring the tenant, who takes all the gains, to bear all the losses ! Our institutions, however, are not always in such unison with good sense. A flagrant instance of guarding against an established law, as against a nuisance, will be exhibited under the subsequent head of *Trusts*.

Sect. 3.—Of Rents and Profits ; involving, 1. Their Apportionment between successive Takers. And, 2. Their Disposal during a Suspense of Ownership.

53.

On the death of a lessor or other reversioner, expectant on any letting, whether entitled to an absolute or to a partial estate, the rent shall, in all cases, be apportioned, up to the day of his death, between his personal representative and the next taker. Emblements shall be allowed to the personal representatives of a partial owner, but not of an owner in perpetuity.

Art. 53.—By our present law, where land in settlement is leased for a valid term, under a power, the rent not being due before the day fixed for payment, belongs wholly, on the death of the tenant for life, during the intermediate period, from the preceding day of payment, to the remainder-man. Where the tenant for life, however, has no power of leasing, the rent, which, under a refinement of the common law, was wholly lost, is now apportioned by 4 Geo. II. between the personal representatives of the tenant for life and the remainder-man. As between the heir or devisee, and the executor of an absolute owner, the current rent, in all cases, goes to the former. It is thought ad-

visible to abolish these several distinctions, and to establish the equitable principle of apportionment in every instance.

That part of the article which regards emblements, is nearly the present law. The distinction rests upon the ground that, in a partial estate, he who sows should reap ; but with an absolute interest the owner may dispose of the crops separately, if he chooses. If not, the principle of simplicity requires, that they should go with the land.

54.

Whenever, under a modified disposition of land, there shall be a suspense of ownership, the rents and profits shall, during its continuance, belong to the person presumptively entitled to the next eventual estate.

A distinction, refined but substantial, subsists under our law, between estates vested, but defeasible on a future event—as a limitation to the first son of A, but if he shall die under the age of twenty-one, then to his second son ; and contingent estates—as, a limitation to *such* son of A. as shall first or alone attain the age of twenty-one. In the former case, the estate belongs to the first son, and draws with it the rents and profits, till the event happens. In the latter case, nothing vests, and consequently the rents are undisposed of, and belong, as such, to the donor and his heirs in the interim. There can be no doubt but the donor,

were the distinction explained to him, would in the latter case, as well as the former, give the accruing rents to the infant donee, as the law now does in the prevailing instance of an infant tenant in tail. But, in addition to this primary motive of intention, the proposed article will assimilate and simplify the law in all dispositions of an eventual nature. It will also enable me (as will appear hereafter in Appendix N^o. 3.) materially to abridge the form of settlements; by effecting that through the fixed and correct medium of the law, which, in the succinct mode of limitation wherein these dispositions are meant to be couched, would otherwise require an express provision.

CHAP. IV.—*Of Charges in general.*

Land may be charged with either a yearly or a capital sum, under the following regulations :

Sect. 1.—*Of Yearly Charges, or Rents.*

55.

A rentcharge may be granted out of land to any person in existence at the date of the instrument, if a deed, or if

a will, at the death of the testator ; either for the life of the grantee, or for the joint lives of himself and any other person or persons, or for any less period ; to take effect, either presently or at a future day. Rentcharges for any longer term are wholly void.

56.

All rentcharges are payable, unless otherwise expressed, on the 24th day of June and the 25th day of December in each year, in equal portions ; except as to the first and the last payments thereof. Each of these payments shall be an apportionment ; the former up to, and to be paid on, the first of the said half-yearly days of payment ; and the latter up to and including the day of the determination of the rentcharge, and shall be due on the following day.

57.

Whenever a rentcharge, or any portion thereof (including the final apportionment), shall be unpaid for twenty-one days or more, the grantee may levy the same, by distraining any goods on the premises charged, and selling the distress according to the law in that behalf in civil cases ; and such distress and sale may be repeated, whenever necessary, until the rentcharge, and all arrears thereof, and any costs attending the nonpayment thereof, are fully discharged.

Art. 55, 56, 57. The period of an existing life is sufficient for every legitimate purpose of an annuity: namely, either in settlements, to afford a subsistence, for a son during the life of a father, who holds the estate; or for a wife surviving her husband; or on any occasion whatever, to make a personal provision for an individual, either during his whole life, or until he acquires other property by the death of a third person. In the first and the last case it should be borne in mind, that the object of the rent is equally at an end by the death of the grantee, or of the person on whom his expectations depend; so that a period of joint lives is adequate to each. If it be objected to the restriction of such grants to persons in existence, that future issue may require an annuity by way of maintenance during infancy, the answer is, that such provisions are usually made in the shape of interest for their portions, by the amount of which they are best regulated.

At present, rentcharges are not apportionable up to the day of their determination; but they are lost to the grantee from the last preceding day of payment. The remedy too of distress vanished by our law with the rent; and to provide for the arrears, we usually limit a power of entry, and perception of rents to the representative of the grantee, and a term of years (that eternal medium!) to a trustee. To supersede these supplementary remedies—to give the grantee his full and

fair benefit of the rent—to appoint fixed days of payment, and—to avoid the constant repetition of a power of distress, in every individual grant, any more than in a lease, are among the objects of the three preceding articles.

Sect. 2. Of Principal Charges.

58.

Land may be charged, by deed, with any capital sum, either on loan, or under any collateral contract ; to be paid at and in such period and manner as the contracting parties may agree upon ; with any legal rate of interest in the interim. Any such charge also involves a personal obligation, on the part of the person charging, for the payment of the principal and interest, agreeably to the contract.

59.

Land may also be charged, either by deed or will, with any capital sum, by way of portions to issue, or of provision for, or gift to any individuals ; to be paid either absolutely or eventually, at any period, not exceeding the majority of any issue, in existence or conceived, at the death of the donor, or of any third persons, who may actually have, or may acquire, life-interests in the land charged ; either by prior title, or under the same instrument.

Any such last charge may be made either with or without any legal rate of interest for all or any part of the period, until payment thereof.

60.

Whenever a capital sum, charged on land under either of the two preceding articles, shall be unpaid for six calendar months or more, next after the period appointed for its payment, the Clerk of the Peace for the county where the land charged is situate shall, on the summary application of the incumbrancer, issue a summons to the actual owner, whether absolute or partial, of the property, to pay the same, with all arrears of interest, and all costs consequent upon any nonpayment thereof, on a fixed day, not exceeding three calendar months from the date thereof. Such summons shall be served upon the owner personally; or, if not to be found, to be left at his usual or last place of abode; and a copy thereof, in the last case, shall be left at, or placed upon the most conspicuous part of the premises charged, requiring such owner to pay the same accordingly. In default thereof the incumbrancer, after filing with the Clerk of the Peace an affidavit of the due service or the leaving and affixing of such summons, and that the same was not complied with, may proceed to sale, by public auction, of the property charged; and he may, thereupon, convey, by deed, the property so sold, to the purchaser thereof, or as he shall direct, but without prejudice to any prior incumbrances. The Clerk of the Peace shall certify in the margin of the conveyance, that

the affidavits above required had been duly filed in his office. And such conveyance and certificate shall discharge the purchaser from all liability to see to the necessity for the sale, or to the application of the purchase-money. The purchase-money shall then be applied, 1. In discharge of any prior charges of capital monies, with any arrears of interest thereof. 2. In discharge of all expenses incident to, or consequent upon the sale, on the seller's part. 3. In discharge of the capital money secured, with any arrears of interest thereof. 4. In discharge of all subsequent charges of capital monies, with any arrears of interest thereof. And lastly, the surplus, if any, shall be paid to the mortgagor, if entitled absolutely; but if only partially, it shall then be applied in the manner directed by Art. 45, concerning monies to arise by any sale effected under it.

The objects of the three preceding articles are, first, to obviate the inconveniences noticed in Part I. Tit. 3. ch. 6, as attendant on mortgages and other charges, in their present state; and next, to provide one uniform and adequate remedy for the mortgagee, or other capital incumbrancer.

The only resort of a mortgagee, under our law of conditions, was, that of a foreclosure; and it may be noticed that, by the *Code Civil* (Art. 2168, 2169), a mortgagee may demand, as against all possessors, either a sale or an abandonment of the property charged; but what the mortgagee needs, and all he is fairly entitled to, is his money, and

not the pledge. This principle is acted upon, in our modern practice of introducing powers of sale into the mortgage. It prevents, on the one hand, delay to a mortgagee, having occasion for his money; and on the other, oppression upon a necessitous mortgagor. The powers of sale, however, at present given, are usually framed at the dictation of the mortgagee; so that, besides being various, they are generally brief and harsh. In correcting these defects, and in order to throw around the mortgagor, at a small expense, the protection of publicity and judicial form, I have again resorted to the local tribunal of the Quarter Sessions.

It may perhaps, be conceived that, by giving to each individual of a class of younger children the same remedy for his single portion, as and when due, as to a mortgagee for the whole of his debt, the estate would be harassed by successive sales. This remedy, however, subsists at present through the medium of the trustee; and with the disadvantage, in the case of a sale, of effecting it for a term only. The fact is that, in practice, when a child wants its portion, the owner of the estate generally raises it by a mortgage for the term. The same course may be pursued here by a mere assignment of the portion, either by the child itself or her husband, if a female; with this further advantage, that its inherent power of sale will pass with it to the mortgagee.

61.

Whenever the interest of a capital charge shall be in arrear for twenty-one days or more, the incumbrancer may levy the same, by distraining any goods on the premises charged, and selling the distress according to the law in that behalf in civil cases; and such distress and sale may be repeated, whenever necessary, until the interest, and all arrears thereof, and any costs attending the nonpayment thereof, are fully discharged.

As mere interest resolves itself into an annual charge, I would give the same remedy. At present, it is blended with the capital, and does not admit of a summary recovery by the means proposed. The actual tenant, in each of these cases, may inquire into the incumbrances; or, if this be thought impracticable, from the nature of his relation with his landlord, he may retain his payments out of the next rent. In practice, however, these extremities rarely occur.

Sect. 3.—Regulations common to yearly and capital Charges.

62.

Every charge shall take effect according to its priority of date, subject to the regulations in Title VIII. No incum-

brancer may, by buying in any prior charge or interest, or by any other means, exclude or postpone any intermediate charge, or otherwise disturb the original order of time.

Next to the direct tenor of the preceding article, its chief object, (assisted as it is by the proposed abolition of all distinction between legal and equitable estates,) is, to defeat the present doctrine of *tacking*; whereby, according to the present rules of our courts of equity, a subsequent incumbrancer may, by getting in an anterior legal interest, defeat or postpone a prior mortgage; or a mortgagee, who is also a bond creditor of a deceased mortgagor, may, in respect of his bond debt, defeat the equitable claims of his fellow-creditors of the same class; with other anomalies resulting from this doctrine, as depicted in Part I. Tit. iii. c. 6. Another effect of the article will be, to extinguish, as far as mortgages are concerned, the equitable doctrine of notice. This, however, will fall more directly under our consideration in the subsequent title of Registration.

63.

The preceding articles of this chapter shall not prevent contracting parties from making any agreement respecting the receipt and application of the rents and profits of the land charged; or the insurance against fire of any build-

ing thereon; or any other preservation of the property, pending the security.

Deeds of receivership, and agreements to insure against fire, though of frequent, are not of constant occurrence. In the instances of temporary and secondary securities, and also where buildings form the subject, they are of great importance, and their provisions can in no respect interfere with the principles of the preceding articles. It has appeared, therefore, most advisable, merely to recognize the rights of contracting parties to make them where deemed expedient.

CHAP. V.—*Of Powers.*

By a reference to this Title, in Part I., it will be seen, that the law of powers will be greatly contracted by—

1. The abolition of all distinction between legal and equitable estates.
2. The requiring all dispositions of land, or any interest therein, to be made *directly* to the alienee, and not through the medium of third persons.
3. What is only a consequence in principle, but calls for distinct notice in practice, the enabling wives to make direct dispositions of their land by

way of conveyance, instead of appointment under powers.

4. The legal incidents attached to partial estates.

5. The legal powers of partition given to joint-proprietors by a.

Of these, the three first will effect the superseding of numerous classes of powers. The fourth will place powers conferred by the law beyond the caprice of individual donors of powers, and any defect of mode or expression on the part of the donees. The fifth will simplify and render practicable, at a comparatively small expense, powers (taking this term in its largest sense) now depending partly on common law, partly on statute; and (what at this day exceeds both together) an equitable jurisdiction, which achieves only half its object; all of these, too, being invested with a character of judicial process, where nothing is really in question.

It remains only to impart simplicity and certainty to what must still be classed under the distinct title of individual powers.

Sect. 1.—*Of the Division of Powers.*

64.

Powers, in relation to their object, are either general or particular. They may affect either the entire property, or only a partial interest in it. Subject to the power, the

appointable property may belong, either wholly to a stranger, or partly to a stranger, and partly to the donee of the power. In the latter case, any disposition by the donee derives its effect wholly under the power.

Sect. 2.—Of the Transfer of Powers.

65.

In all cases of involuntary alienation, general powers are transferable, and their subject is disposable, like any beneficial estate of the donee.

Sect. 3.—Of the Extinguishment of Powers.

66.

Powers, whether general or particular, are extinguished by any disposition of, or assumed dominion over their subject, incompatible with their exercise.

67.

Where the disposition is only partial, either as to the subject, or any interest in it, the power is not affected beyond the extent of the disposition or charge, whatever may be the mode of affecting it. What is not aliened remains appointable.

Arts. 64, 66, 67.—It has been intimated, in the first Part of this Essay, that the chief practical use

of the present technical division of Powers into—*appendant—in gross—collateral—and simply collateral*—is, to fix the modes whereby they may be suspended or destroyed; and that the latter of these effects often occurs, independent of, or even contrary to, the intention of the donee, or the nature of his disposition. These consequences will, to a great degree, be prevented by the proposed institutions noticed at the commencement of this chapter. The above articles are framed to meet the remainder of them; and with the further views of classing powers according to their essential characters, and preventing a confusion of operation, which at present not unfrequently occurs between powers and partial interests.

Art. 65.—General powers are equivalent to absolute interests, and at present are often used as protections against the legal rights of creditors; as these do not attach upon them till executed. The injustice of this technical protection has already been perceived by the legislature, in the instances of bankrupts and self-declared insolvents; the respective assignees of whose estates are enabled, by 6 Geo. IV. c. 16, and by 3 Geo. IV. c. 123, to exercise any general powers vested in these defaulters.

Sect. 4.—*Of Appointments under Powers.*

No. 1.—Of Appointors—the Modes of Appointment— and the attendant Formalities.

68.

Appointments may be made by any persons aged twenty-one years, and not under any mental or criminal incapacity. They may be made either by deed or will. They are susceptible of either mode of assurance, unless expressly confined to a will. If made by deed, they are subject to the regulations of Art. 28. If made by will, they are subject to the regulations of Art. 35.

The main object of this article is, to assimilate appointments, especially in their formalities, to other legal instruments. The effect will be, to extinguish the questions which form a numerous class of cases, and still frequently arise—whether a power, describing the instrument of appointment in terms, or with formalities, more appropriate to a deed, may, notwithstanding, be exercised by will. With this view, in analogy to other rights of alienation, they are made exerciseable either by deed or will, unless expressly confined to the latter. In practice, indeed, this would be best effected by not specifying in powers (unless in the instance of

married women, who may require the protection of a revocable instrument, as a will is), the mode, whether deed, writing, will, or otherwise, by which they may be exercised. Another, and perhaps still greater practical benefit, would result from preventing, as the preceding article would do, the caprice at present exercised by donors or their legal advisers, in the various idle ceremonies attached by them to the execution of powers. The distinction, too, between a testamentary appointment under a power reserved by the appointor himself, and a power given to him by a stranger, with others of the same subtle features, would also disappear; and a will of land, however it acquired its force, would ever bear the same uniform character. Every needless distinction abolished, affords a correspondent clearness of right, and protection against litigation.

No. 2.—Of the Periods when Appointments shall take Effect; and their Objects.

69.

Appointments under general powers operate, if made by deed, from the period of its execution, agreeably to Art. 34. If by will, from the death of the appointor, agreeably to Art. 36. The property appointed is attended with all the incidents, and subject to all the regulations, attached to interests alienable under Art. 27, and its references.

70.

Appointments under particular powers operate from the same respective periods as are expressed in the preceding article, but under the following restrictions :

1. *No appointee can take, who would not be capable under the regulations of Art. 43, 44, 45, of taking, at the time of the execution of the instrument conferring the power, if a deed ; or at the death of the donor, if a will.*

2. *Particular powers conferred after the date of a will, may not be exercised under any prospective dispositions in it.*

In the two preceding articles, the object of assimilation of appointments to dispositions of interests is pursued, with reference to their *substantial* qualities. General powers are, as already noticed, absolute interests, when executed. As appointees, however, under particular powers, are indicated, as to their classes, though not individually, by the instruments conferring the powers, the laws against perpetuities forbid, that any persons should take as such, who were incapable of doing so under the original instrument. To guard against this, the first restriction in Art. 70 is framed. The second restriction is introduced, in consequence of the proposed amendment of making wills operate on all lands to which a testator may *die* entitled, instead of confining them to his land at the date of his will. As particular powers are chiefly of a fiduciary

character, and as uncertainty, and consequent litigation, might result from seeking to exercise, by anticipation, not a beneficial right, but a mere discretion over undefined interests, in favour of future objects, it seems more congenial to the nature of such powers, to require their actual existence before they are exercised.

71.

Under a power to distribute property between particular objects, the same or any part of it may be appointed to any of them, in exclusion of the others, unless some specified portion of it is required to be limited to each of them.

The object of this article is to extinguish, not only the equitable doctrine, so generally reprobated, of illusory appointments; but also the numerous verbal distinctions, already noticed under this head in Part I., between *exclusive* and *distributive* appointments; founded upon the words *such*,—*all such*,—*amongst*,—*the*,—*or*,—and similar phrases, to which the donor never could have attached the vital importance judicially attributed to them. It may be safely affirmed that, whenever a power of distribution is given, it is meant to confer the fullest discretion, both as to subject and object; and it is the duty of a legislator to oppose positive enactment, even at some violation of mere literal sense,

to judicial constructions, which effect a more important violation of the donor's intention.

72.

Where a parent makes a partial appointment of land, or money charged thereon, in favour of any of his issue, being objects of the power, the same shall be deemed an advancement, pro tanto; and shall be brought into account, upon such issue claiming a share in the unappointed part.

Under the present law, where a specific part of the property is appointed to one of several particular objects, the remainder goes as unappointed; by which means the appointee gains also an equal share with the other objects in the residue. This generally contravenes the intention; and, to guard against it, an express clause is usually introduced in settlements, to the effect of the preceding article. In analogy, however, to the distinct rules which govern portions, I have not carried it further than the case of parent and child, or other issue.

73.

In other respects, appointments under particular powers are attended with the same incidents, and subject to the same regulations, as are attached to interests, under Art. 27, and its references.

It may be here noticed, that the proposed abolition of estates tail, and exclusion of the necessity for words of inheritance, in all dispositions, will prevent the numerous questions noticed in Tit. iv. c. 3, s. 6, n. 2. (4thly,) of Part I., upon the extent of an appointee's interest, under both species of powers.

CHAP. VI.—Of Warranties, or Obligations for the Title.

74.

Every conveyance and charge for money, or on marriage, or for other valuable consideration, involves, on the part of the grantor, where not otherwise stipulated, a warranty, or legal obligation, for the peaceable enjoyment, by the grantee or incumbrancer and all his subclaimants, of the interest departed with, against all rightful claimants; or, in case of lawful eviction, to pay :

1. *The value, at the time of eviction.*
2. *Any rents or profits which the rightful claimant may have recovered against the grantee, or any his subclaimant evicted.*
3. *All costs and expenses which the evicted may have incurred, both in the original purchase, or other acquisition, and in defending the title.*
4. *Any extraordinary damages, to be specially proved.*

75.

The warranty attaches under every original conveyance or charge above described, in respect of every interest, whether absolute or partial, transferred or created by it; and also in respect of any derivative disposition, for a valuable consideration, made by virtue of a legal incident or special power, arising under, or given by, any deed or will; except leases at rackrent, not exceeding twenty-one years, and accompanied by possession. In the event of any such disposition, the warranty, if deriving its effect from a deed, attaches on the grantor and his assets; if from a will, upon the assets of the testator.

76.

Whoever possesses, as proprietor of land, any deeds or other muniments of title, applicable, either wholly or partially, to other lands, is bound to produce them, at the instance and costs of any owner, either absolute or partial, of such last land, for maintaining his title thereto, as far as it may be concurrent, in any court of justice, or other place of competent jurisdiction or inquiry.

Arts. 74, 75, are intended as remedial of the defective rules animadverted on in Part I. Tit. iv. c. 3, s. 4; and also to supersede the necessity for express covenants in every individual conveyance or charge. Our present covenants for the title likewise embrace one for further assurance. A grantor, however, who is subject to an absolute

warranty, would, for his own sake, perform every requisite to strengthen his grantee's title; and, in practice, this covenant is scarcely ever brought into action: not to urge that, in the modern local and private acts, which attribute to conveyances directed by them the effect of covenants for the title, that for further assurance is scarcely ever mentioned.

Art. 75 is also framed to meet an unquestionable principle in all warranties, that they should embrace every fraction, both of property and of interest, created by the original deed to which they attached. This is effected but defectively, and in some instances very circuitously, by our present system of covenants for the title. In the instance of a sale under a trust, or a power in wills, no obligation at present exists, though the principle be the same. The protection afforded is indeed imperfect; since the assets bound are presently distributable; but it is the best the circumstances would afford. If more be sought, it must be the result of express stipulation with the immediate beneficial owner.

Art. 76.—The operation of general warranty, to render it the grantor's interest to protect his grantee's title, would also induce him and his sub-claimants to produce, for that purpose, whatever title-deeds may be in their possession or power. But these may fall into the hands of other proprietors, not bound by the warranty; and, by the present practice, titles, even with attested copies,

are not deemed marketable, unless the original deeds are accessible; or rather, are *covenanted* to be produced. On the other hand, whoever, by acquiring the larger portion of several lands, held under the same title, whether by purchase, devise, or descent, gains the advantage of possessing the deeds, must, in principle, be deemed to hold them as common property; like a main dyke, or a bulwark, for the general protection of the co-proprietors.

CHAP. VII.—*Of Joint Proprietors.*

77.

Where land is aliened to two or more jointly, whether with or without distinction of shares or interests, or in whatever terms, the share of each of them, upon his death, shall pass to his real representatives, and not to any surviving proprietor, unless an express right of survivorship be given; or in the case of active trustees.

The feudal origin of the *jus accrescendi*; its unsuitableness to the present rights of property; its positive injustice; and the consequent interference of equity in particular cases, have already been amply stated, under the present title, in Part I. The instance of active trustees, so circumstanced under the present code, forms a necessary exception.

78.

It shall be lawful for the Chairman of the court of Quarter Sessions for the county where any land held in undivided shares is situate, to make partition thereof, on the summary petition of any person, being absolute owner of an undivided part thereof, who shall have given thirty days' previous notice in writing of presenting his petition to the other shareholders in possession, whether as owners, absolute or partial, or as husbands, guardians, committees, trustees, or holding by process of law; or shall have left the same at their respective usual or last known places of abode. The order of partition shall vest the respective allotments in the persons to whom the same shall be adjudged, for and according to their respective estates and interests in the undivided shares, in lieu of which the same shall be given; and all charges and incumbrances which previously affected any individual share, shall become transferred to and attach upon the allotment to be made in lieu thereof.

As far as regards the petition itself, this article is in affirmance of the present laws. Its chief object, however, is in lieu of the dilatory and expensive process of a commission from the metropolitan Court of Chancery, (the chief transaction under which, namely, the partition itself, is effected by the commissioners in the country,) to substitute, after the precedent of the power already alluded to,

in the General Inclosure Act, with the addition of a local tribunal, a cheap and summary proceeding on the spot.

79.

In making partition, the chairman may order any money to be received and paid for equality of partition; and where any share shall be in settlement, or any owner thereof shall be under legal disability, the same proceedings shall be had, in relation to the money to be so received or paid, as are directed by Art. 45 in the case of a partition of land, whereof an undivided share is under settlement.

TITLE V.

OF COMPULSORY ALIENATION, OR THE RIGHTS OF
CREDITORS.CHAP. I.—*Of the Rights of Individual Creditors*
inter vivos.

It has been shewn, under the present head, (Tit. iv. c. 3. s. 7 in Part I.,) that these rights now attach upon both real and personal property, in a manner so intermixed, as not to admit of distinct institutions for either species apart from the other. The limit, however, of the present essay to *real* property, precludes any attempt at a general system on the subject; I shall content myself, therefore, with framing, for present discussion, some articles respecting land; premising that one crying defect, in the inability of creditors to extend copyhold lands, will be silently removed by the abolition of this tenure; as will the frequent frustration of their remedies against the debtor's freehold, from the getting in old terms of years and other satisfied legal interests, be prevented by the extinction of these technicalities.

80.

The real property of a debtor, by judgment or recognisance, (a) whether it be present or reversionary, and whether belonging to him at the time of the lien, or after acquired, may be sold, or the profits thereof may be applied, by force of a writ of execution under the following regulations:—

1. *The personal property of the debtor, of whatever description, whether in possession or action, present or expectant, within the same county, shall be first sold, and the produce thereof applied towards the debt.*

2. *The sheriff shall make a return of the result of the process against the personal estate, and twenty-one days notice in writing thereof shall be served upon the debtor, or left at his usual or last known place of abode, before the sheriff shall proceed to execution against the land.*

3. *If, in the judgment of the sheriff, one year's amount of the clear rents or other profits of the real property of the debtor, within his jurisdiction, shall be sufficient to answer the debt and costs, then the sheriff shall receive and apply such rents or other profits accordingly, and shall not proceed to a sale.*

4. *The sale of real property in different counties shall take place successively only, after the return to each prior writ of execution; unless where the property in two*

(a) *The allusion of this expression will appear in the subsequent chapter on Assets.*

counties forms one and the same farm or holding. Property in possession shall be sold, and the produce applied, before expectant property.

Having given a large extension to the remedies of creditors over land, the attachment and respect attending this species of property render it but reasonable to afford some protection to its possessors against a harsh or hasty disposition of it. With this view have the preceding regulations been framed. Some of the suggestions, I am bound to admit, have been taken from the *Code Napoleon*, (tit. 19), but adapted to our own institutions.

Under the present head, in Part I., I have enumerated the large proportion of personal estate, consisting in money, funds, loans, commercial shares, &c., and choses in action of every description, at present capriciously exempt from the demands of creditors. The first of the preceding regulations *alludes* to the proposed extension of their remedies against these privileged articles. An express enactment on the subject, though one of the objects within my contemplation, would have been misplaced in a code of real property.

The third regulation is no novelty; but a revival of the old writ of *levari facias*, which is still put in force under a sequestration of the profits of a clerk's benefice. It was superseded, as to *lay* possessions, by the *elegit*; which, in its turn, would

be superseded by the more efficacious remedy of a sale.

The privileges of the crown against its debtors and accountants, and of the latter, (by means of *extents in aid*,) against *their* debtors, to the extent of the actual debt owing to the crown, fall, in one sense, within the present chapter ; but their more prominent character is that of prerogative rights, and under this view I have touched lightly upon them in the first part of this essay, and shall not now propose any express enactment on the subject ;—the privileges themselves, perhaps, would not admit of contraction, but merely of regulation. But titles are exposed to hazard from the want of a register of liabilities to the crown : among these, it is a frequent occurrence, that a gentleman becomes a surety for a friend, accepting an office under government, and afterwards, on selling his estate, forgets it. No diligence, on the part of the purchaser, (for where is he to search ?) can detect this occurrence ; but it may, at a future day, be suddenly visited upon him by an extent. The public however have, on their part, to concede the liability of copyhold estates, and of credits, and other personal property not reduced into possession, (as defined in Art. 80, n. i., *ante*,) to crown process. In return for this and other needful regulations, they may reasonably require, that all liabilities to the crown, and to its debtors, or accountants, be registered, like any other legal liens.

CHAP. II.—*Of Bankruptcy, and Self-declared
Insolvency.*

IN consequence of the recency of the laws respecting bankrupts and insolvent debtors, and the extended observations already made, in Part I., on such parts of them as regard real property, I shall content myself here with referring to those remarks.

CHAP. III.—*Of Assets.*

As some counterpoise to the superior advantages, both civil and political, attending our different rules of succession to land and to moveables, coupled with unlimited testamentary power, the transmission of every species of property in the same course, under the *Code Napoleon*, as it at present stands, certainly precludes all questions and accounts between different classes of representatives and testamentary donees, regarding their respective contributions to the ancestor's debts. Of our regulations, however, on this subject, though some are indispensable, a considerable portion have arisen from the defective provisions of our law for the payment of debts; from the circuitous contrivances of equity to remedy them; and from mere technical distinctions between law and equity.

Possessing (as I conceive our system of succession, coupled with the testamentary power, does), a decided superiority in the main, it is the more incumbent on us to strengthen its weaker points, by lopping off all redundancies, and by simplifying and giving method to its *necessary* characters.

The abolition already proposed of *formal* trusts, (which involve equitable interests,) and the reduction of mortgages into their natural character of charges, will extinguish the present technical distinctions between *legal* and *equitable* assets. By rendering the real estate liable, in the second degree, and in aid of the personal, to the payment of debts of every description, we shall avoid the complicated and costly process of *marshalling assets in equity*. The co-operation of the two measures, with the assistance of some secondary ones about to be proposed, will clear the way to a simple and just system for the distribution of assets.

I anticipate some reluctance on the part of land-owners to the subjecting their real estates to the payment of their debts of every description. Independently, however, of the justice of the measure, (which, even at present, frequently prompts upright testators to charge them on their lands, by their wills,) and the now all-powerful influence of public opinion, they probably are scarcely apprized, that this liability is already effected, to a very large extent, though in a most circuitous manner, and at an enormous waste of money and time, both to the

estate and the creditor, by means of the equitable jurisdiction and occasional legislative aids indicated under the present head in Part I. It will not be overstating the result, to assert that, by one or other of these interventions, a simple-contract creditor seldom fails to establish (I do not say *to receive*) his debt against the real estate.

Passing from the deceased debtor to the creditors,—of these there are at present three classes; exclusive of those having specific charges, as mortgagees, portioners, who, for the present purpose, may be passed over—namely, 1. Creditors by judgment, or other act of record; 2. Creditors by specialty, or by contract under seal, as bond, or covenant; and 3. Creditors by simple contract, comprising every other description of general creditors. The first of these have their legal liens, to which it is sufficient merely to advert. The discontinuing the practice of sealing (which has been already suggested in Art. 28) will deprive the second class of their distinction over simple contract creditors. This was among the objects contemplated, and on the following considerations—a bond has nothing, in its publicity, or solemnity, to entitle it to preference over a promissory note, bill of exchange, or other simple-contract obligation; nor, indeed, *has* it any, during the obligor's life, except perhaps in the mode of pleading, which might easily be extended to the latter. Even after his death, its advantage is but small, and that very

contentious, whenever the assets are administered in equity. Should a privileged security be desired, but with a suspended operation, while the contract is duly performed, this is now afforded by a warrant of attorney to confess judgment, with a defeasance; which, when completed, places the creditor among the first class; but it rests on the fiction of a supposed suit—is consequently circuitous;—for the purpose of general notice, it is defective—as it may be given in any of one of the different courts of record at Westminster, so that the rolls of *all* must be searched; and it is mixed up with the records of adverse suits, with which a mere security has no connexion. These objections necessarily produce the additional one of needless expense. Might not the desirable characters of directness and promptitude be acquired, at the single expense of a bond, by a *recognisance* to the creditor; to be enrolled at any time in some specified court of record at Westminster, (say the Common Pleas, as being anciently the court for pleas of land,) and with the clerk of the peace for the county where any land to be affected by it lies; to have, *from thenceforth*, the effect of a judgment:—in the *interim*, to possess the effect of a common obligation? In preserving this latter character, it would have a further advantage over a warrant of attorney, which, if the cognizor die before the judgment is entered up, loses all its efficacy. For the further protection of titles, the enrolment should be renewed

at stated intervals, say every five years : but more of this in the subsequent chapter on registration. General creditors would then be reduced to two classes ; the one *with* legal liens, the other *without*. In urging this diminution I beg to repeat (it cannot be done too often) the advantage of simplicity ; removing (as it would here) all questions, and accounts (frequently as formidable as questions) in the distribution of assets, between the extinguished class, and any other description of creditors, or any claimants of the land, in the characters of heirs or devisees. The *Code Napoleon* knows only of the two classes of creditors which I have proposed to preserve.—See Tit. XVIII. throughout.

With regard to pecuniary legacies, the precedence, by a long course of ages, of tenures to testamentary power, precluded legacies from becoming a charge upon the land by their mere gift ; as was the case in the civil law.—When subsequently admissible as such, an express charge was necessary. In actual intention, however, the donor of a legacy means it to be paid, if he leave property of any description to answer it. Under this impression has equity acted, as far as it felt itself permitted, in marshalling real assets *descended*, in favour of a legatee ; and in preventing a mortgagee, whose security was created or adopted by the testator, from resorting to the personal estate, to the prejudice of a pecuniary legatee. With this clear

intent, and constant struggle of equity in favour of it, both justice and policy demand, that pecuniary legacies should be freely let in as secondary charges upon land.

I shall follow up the preceding observations with an outline of the articles necessary to give practical effect to them, and to obviate the strictures, passed in Part I. of this Essay, upon the existing laws on this subject.

81.

Assets of a deceased are either real, comprising all property descendible to the heir, or personal, comprising all property distributable by the executor or administrator.

82.

The value of the real assets is applicable by the heir or devisee, and the produce of the personal assets is applicable by the executor or administrator, in payment of the debts and pecuniary legacies of the deceased, in the order hereafter stated. They may freely dispose of the property for that purpose. But any creditor or legatee may require the assets to be administered under the direction of a court of justice. Reversionary or contingent assets are convertible before they fall into possession, for the payment of debts; but not of legacies.

83.

Assets are applicable, unless otherwise directed, in the

following order—1. personal estate not specifically disposed of—2. real estate devised for, or otherwise appropriated to, the payment of debts—3. real estate descended—4. real estate devised in general terms—Then, (for payment of debts only,)—5. personal estate specifically bequeathed—6. real estate specifically devised.

Art. 82. As the law now stands, assets are not applicable before they fall into possession—(*quando acciderint*) ; but justice requires that they should be rendered so, in whatever state they may be, for the payment of debts.

Art. 83. By reference to this head in Part I., the present legal order of distribution will be found somewhat different. The proposed general liability of real estates to debts and legacies, together with the extinction of specialty creditors, as a separate class, unless they acquire the legal lien now enjoyed by judgment creditors, will produce various simplifying, and other remedial effects. First, it will prevent the necessity for any *charge* upon the realty ; and, consequently, all questions upon the effect of loose expressions to produce a charge or not, and all distinctions between a mere charge, and a trust or other appropriation ; as no such disposition would afterwards be made, unless with the intention of rendering land a primary fund, or otherwise varying the legal order of charge. Next, it will protect specific legatees ; as long as they do not interfere with the

rights of creditors, or with specific devisees, who are equally privileged with themselves. And, lastly, it will establish a just distinction between lands, when devised specifically, and when in general terms, in favour of the former, which does not appear to have been hitherto taken, where there is no charge of debts on the realty ; though, in a testator's intention, a general devise is always subsidiary to all legal demands ; and indeed, the distinction actually subsists, as between specific and pecuniary legacies ; and again, between pecuniary and residuary bequests.

TITLE VI.

OF ALIENATION BY ADVERSE POSSESSION, OR
LIMITATION OF TIME.

OUR present law distinguishes, in a manner more marked than other legal systems, between *positive* prescription, or that length of time which is necessary to establish a title to what are called *incorporeal* hereditaments, (being in reality mere servitudes on the land;) and *negative* prescription, or the period beyond which a right to *land* cannot be enforced against adverse possession. The narrow limits, however, to which incorporeal hereditaments or servitudes will be reduced by the abolition of tenures, customary descents, and other needless charges and anomalies, will effect a correspondent reduction of the laws of positive prescription. In fact (with the exception of tithes) they will be almost confined to the indispensable rights of light, way and water,—and instead of requiring for these the extravagant duration beyond the time of legal memory, (*viz.*, the reign of Rich. I.) both justice and analogy proclaim it sufficient for them, to have endured for the same period to which the right to enforce an adverse claim to land is limited. As to *negative* prescription, or the limit prescribed

to the remedy for adverse rights to land, the chief impediment to any certainty on this subject is the law of entail, with limitations over; under which an interest may not come into possession (and, consequently, need not be asserted) for a century or more. Its abolition, and the proposed limits to dispositions in expectancy, with the improved means of access, hereafter suggested through registration, of every individual to the instrument or occurrence under which his rights may be derived, will warrant an ample curtailment of the period within which they may be asserted; to the great abridgment and certainty of titles, and a correspondent facility and economy in their disposal, or (what the law professes especially to favour) their *commercial* quality. These purposes may be effected by rules so few, so simple, that, contrasted with the intricacies of real actions, as depicted in Part I. Tit. iv. ch. 3, sect. 8, of this Essay, or even under the more common bars in ejectment, with the various analogous remedies of courts of equity, and in fines, they will scarcely be conceived to regulate the same subject.

84.

Adverse claims to land and to legal servitudes thereon are barred, and the right to land, and to legal servitudes thereon is acquired, by the uninterrupted enjoyment of the possessor, or those from whom he derives title, for twenty-five years, under the ensuing restrictions:—

85.

The bar commences against adverse claimants with the inception of their rights, either to the land, or to the rents and profits of it, subject to any lease.

86.

The bar does not run against the following claimants:—

1. Married women; unless where the property is limited to their separate benefit. 2. Infants. 3. Persons under mental incapacity. 4. Persons beyond the seas.

Against all these, whether original claimants, or sub-claimants, the bar commences only from the removal of such their respective legal disabilities. Should the total period of legal disability amount to twenty years or upwards, then the adverse claimant shall be barred at the expiration of five years after its removal.

87.

When the lapse of time has once commenced against an adverse claimant, of legal competency, it shall not be arrested by any subsequent legal disability, either of himself or his subclaimant.

The foregoing regulations afford a sufficient outline on this subject. They are so connected and so limited, that my explanations may conveniently embrace the whole of them in a single view.

For the security and marketableness of titles,

and after the example of the *Code Napoleon*, art. 2219, I have thought it advisable to confer a right, as well as create a bar, by lapse of time. The *Code* extends the period of limitation to thirty years (art. 2262); nor does it confine within a shorter limit a claimant who may have remained under legal disability during a large portion of this period; so that an adverse right may be kept alive for the space of thirty years after a long existing life. Our own practical period of twenty years (by ejectionment and its analogies) is, perhaps, too short; though aided by the addition of ten years after disability removed. I have judged, as most suitable, a medium period of twenty-five years, or the quarter of a century; with a restriction, where disability has endured for twenty years or more, to five years after its removal. The allowance for asserting adverse claims is still most indulgent to the claimant, and goes to the very verge of what public security requires for the repose of titles.

Art. 25 is introduced to prevent the present improper indulgence of two successive periods of claiming; the one where the land in question is in hand, and the other where it is on lease; but the successful claimant would be entitled to the rent. The distinction between this (an estate in possession, to all purposes, as between the litigants) and a reversionary right, is too obvious to need explanation.

With respect to the privileged classes,—Where

the property of married women is under the management of their husbands, they should not be exposed to the loss of rights which they cannot assert. But, as their privilege is from want, not of intellect, but of free will, they should partake, where they actually possess it, of the liabilities of a free agent. Infants, however, are both helpless, and their guardians are generally too deficient, as well in information as in interest, respecting their ward's property, to warrant the committing it to their protection. The situation of persons under mental incapacity, differs from either of the two preceding classes. Their disability frequently endures through the uncertain (and with them frequently long) period of life; and, consequently, somewhat disturbs the fixedness of legal limitation. On the other hand, their affairs usually undergo discussion upon the finding their insanity; and their committees are persons interested in the good management of their property. For these reasons, I would submit for discussion, the expediency of refusing to persons who may have been legally declared of unsound mind, and of whose property committees have been appointed, any exemption from bar by lapse of time.

Art. 87.—The principle of this article has been generally adopted in bars by lapse of time. Some hardship may occasionally occur, where the ancestor dies soon after the possession becomes adverse, leaving a mere child his heir. But, to provide for

this and similar cases, would open so wide a door for exception, that public expediency requires it to be kept closed.

In fixing the rules of prescription, the *Code Napoleon* has gone into a detail of regulation (from art. 2219 to art. 2281), some of the articles of which are already principles in our own law on the subject; and as to many of the remaining, it is matter for grave consideration, whether it be expedient to legislate so minutely. Several of them, however, are well worthy of imitation; such as art. 2227, which subjects the state, (and *Napoleon* was then its ruler,) and public institutions, to the same bars as individuals. So art. 2231, which, when the possession has commenced on the behalf of another (as a lessor), presumes, that it always continues under the same title, unless the contrary appear. This rule might be usefully extended to cases where such possessor acquires adjacent property or rights through the means, or under colour, of the principal property; as in the instance of inclosures, or other incroachments by tenants. The articles which define the interruption to prescription, either by loss of the possession, or by judicial process (art. 2242 to 2250), also merit attention. The fifth chapter has been anticipated, as far as respects our present subject of real property, by the preceding article 84. With regard to personal actions and moveables, its institutions are clear and judicious.

TITLE VII.

OF ACTIVE TRUSTS.

88.

ANY person or persons may be entrusted, either by name, or in any recognized legal capacity, with the actual disposition, management, or receipt, of lands, or the rents and profits thereof, or any interest in, or charge upon the same, for any lawful period and purposes, for the benefit of the owner thereof, or of any other person or class of persons; and the same, or the necessary authority, may be assured or given to such trustee or trustees accordingly.

Having (in the preliminary art. 5.) abolished mere formal trusts, and having made provisions for the exercise of the ordinary powers of selling and exchanging in settlements, (which will greatly diminish the necessity for trustees in family arrangements,) this chapter is devoted to the subject of active or operative trusts. By "*recognised legal character*," is chiefly intended a guardian. See the comment on the proposed form of settlement, Appendix, No. 3.

89.

The assurance or authority to the trustee must express the actual purpose of disposition, management, or receipt, as far as regards the property entrusted; but, with respect to the produce and its application, the purposes thereof may be declared, either by the same, or by any separate instrument.

Provided that this article shall not prejudice any trusts or liabilities resulting or arising by construction of law.

The object here in view is, to prevent a relapse into mere nominal trusts; and to imprint on the face of assurances that real character, which will be further aimed at in the ensuing chapter on Registration. The proviso is taken from 29 Cha. II. c. 3, s. 7. The contraction, indeed, of trusts themselves will diminish its necessity; but an intervening, or the final trust for the owner, is occasionally omitted; or subsequent occurrences may extinguish the trusts; or property may have been acquired with the funds of another, or *under the influence of* entrusted property; as, by a guardian of an infant lessee, or by a tenant for life, &c.; all which, and similar cases, are only to be reached by legal inference.

90.

In all dealings of the trustee respecting the trust property, its produce, and the application thereof, his receipts

and other acts shall be as valid as those of a beneficial owner.

This article is intended to correct a vicious result from the rule—that “*in equity the trust is the land.*” Arguing from this, it is held that, whoever purchases from, or otherwise deals with the trustee, must, unless in a few impracticable cases, as where the trust is for payment of debts generally, see that the produce of the trust fund goes to the *cestui que trust* or beneficial owner; thus treating as nothing the confidence meant to be reposed in the trustee. The inconvenience of the rule, and its constant frustration of the proposed object, has occasioned the introduction, into the generality of trust assurances, of a special clause, that the receipts of the trustees shall be discharges to purchasers and others. But *that* must surely be a false construction, and a bad law, against which the very parties provide who are meant to be protected by it. Sometimes, especially in wills, the necessary clause is omitted; and then equity struggles against its own rule by new distinctions (*a*), which, in *their* turn, generate more litigation.

(*a*) As where, instead of the produce being *in trust* for the objects, it is to be paid or distributed *by the trustees*, or to be invested by them on security.

91.

Wherever, and so far as, the instrument of trust shall not contain any special regulations on the subject, the following shall take place with respect to the office of trustees; its determination; and the substitution of new trustees:

1. *A trustee may at any time resign his trust, by notice in writing, to be given to the remaining trustees, or trustee, if any; if none, then to the trustor or trustors, or such of them as may be in existence, if not exceeding three in number; but if exceeding three, then such notice may be given to the trustor or trustors in possession, and registered with the clerk of the peace of the county where the instrument of trust shall have been registered, pursuant to Art. 93. But such resignation to be without prejudice to the responsibility of the resigning trustee for his acts, or wilful neglect, during his trust.*

2. *In case of the misconduct, incapacity, or absence beyond the seas for a year, of any trustee, the chairman of the court of Quarter Session for the county where the instrument of trust shall be registered, shall, on the summary petition of the trustor or trustors in existence; or, where they shall exceed two in number, then of the majority in number of them; or, if such trustor or trustors be under age, then of his or their guardian or guardians, remove such trustee.*

3. *On the death, resignation, or removal of any trustee*

or trustees, the chairman of the court of Quarter Session for such county as aforesaid, shall, on the summary petition of such trustor or trustors as aforesaid, or the majority of them, or of such guardian or guardians as aforesaid, appoint a new trustee or trustees; and the order of appointment, when duly registered with the clerk of the peace for the same county, shall vest both the fund and the trust in the new trustee or trustees, either alone, or in conjunction with any remaining trustee, as the case may be.

4. Where there are two or more trustees, and any of them shall die, resign, or be removed, the fund and the trust shall vest wholly in the remaining trustee, until a co-trustee shall be added, agreeably to the preceding regulation.

92.

Where the instrument of trust contains a special power for the appointment of new trustees, the act of appointment (being duly registered) shall vest both the fund and the trust in the new trustee; either alone, or in conjunction with any remaining trustee, as the case may be.

The two last articles are intended as remedial of the inconveniencies complained of in Part I. Tit. I. ch. 3., and of some deficiencies in the present rules on the subject; overloaded, as in many instances it is. For example, no formality or even

notice is requisite for the resignation of a trust ; and it is often questionable, under the wording of particular powers, whether, in the event of survivorship, or of death, *the trust* as well as *the fund*, passes to the survivor, or the legal representative of the deceased trustee ; or whether he is not merely a conduit-pipe to pass the property. As every trust is a personal confidence, the presumption, as to the trust, is in favour of the former character, and against the latter ; and yet in the absence of an express provision on the subject, equity allows the trust to be performed by the heir, necessarily a stranger, and often incompetent. The fund, however, *always passes, even* where it never can be dealt with,—to an infant, a lunatic, or a married woman ; in effect for the mere purpose of being reconveyed.

Art. 92 affords the benefit of a legal provision for constantly annexing the fund to the trust ; even where the parties have expressly provided for the appointment of new trustees. Whether the new trustees, therefore, are appointed by the law, or by the parties, in either case the bare nomination, duly registered, will vest the property in the actual trustees.

In Art. 91 it will be perceived, that I have coined a new term, *trustor* ; by which is meant, the person trusting, whether it be, by creating or taking the benefit of the trust, as opposed to *trustee*, the

person trusted. It is warranted by the structure of our language, and recommended by its expressiveness. I should not, however, have attempted the innovation, but for the uncouth Norman phrase, "*cestui que trust*," utterly unknown beyond the legal pale.

TITLE VIII.

OF REGISTRATION.

WHATEVER may be the public opinion as to a general registration, the actual laws on this subject, as stated in Title VII. of Part I. are too partial, both in locality and subject, and also too defective, to remain in their present state; while, such as they are, the inroads upon their operation, made by the doctrine of *equitable notice*, are not only destructive of these institutions, but also introductive of a new and complicated system, the abolition of which would be cheaply purchased by the sacrifice even of the laws themselves, with their equitable engraftment. On the mischievous tendency of this doctrine of notice, there has ever been but one opinion, among all jurists, both domestic and foreign. (a)

The expediency, however, of either enrolling at length, or registering the substance of all assurances, for the protection of alienees and incumbrancers against latent dispositions, has long been recognised, wherever the laws of property

(a) See *Bull.* n. 1. sec. xi. to *Co. Litt.* 290. b. and especially the foreign authorities, with which the very learned and able commentator illustrates the subject.

have been systematized ; and among ourselves, by the various statutes already noticed in Title VII. Part I. In France, the registration extended, under the old *regime*, to all deeds whatever, and wills (a). Under the *Code Napoleon*, it appears confined to securities and legal liens ; though with certain options as to parties desirous of registering contracts and other assurances. (Lib. III. Tit. 17 and 18 throughout.) Their strict system of legal succession, however, can be but sparingly infringed by settlements and wills ; which, in our laws, form such extensive modes of disposition, and, therefore, equally require notice. After embracing these, purchase-deeds, if omitted, would form a solitary exception, scarcely to be defended on principle ; while the including them would complete the protection and the system of registry, as far as respects legal assurances.

A difference of opinion has prevailed, whether enrolment at length, or registration of the substance, be preferable. Against the former are objected, the disclosure of private transactions, and the length and expense of the roll, and of subsequent transcripts. In favour of the latter it is urged, that it avoids these objections ; while, in stating the instrument, the parties, and the land affected, with the general character of the interest disposed of, every circumstance necessary for the

(a) *Bull.* note already referred to.

information of the public is disclosed. In my view, this is an entire exposure of the case; and resolves it into a clear preference of the latter practice.

93.

A memorial, written on vellum or parchment, shall be registered of every deed affecting land, with the Clerk of the Peace for the county, or for each county, where the land lies, within thirty days after the date of the deed. Every such memorial shall contain the date of the deed, the names and descriptions of the parties to it, its operation or general character, and the particular land affected by it, within the county in question, or the parishes or places where such land lies; in the form or to the effect expressed in Art. 101, but with any alterations or additions which the nature of the case may require: otherwise every such deed shall be utterly void.

Art. 93. The provisions in this article speak for themselves. They are conceived to embrace all that is essential for public information. The Clerk of the Peace is named, as being an existing officer, merely to indicate, that registry by counties is proposed. In practice, it will be found necessary to have a distinct registrar, with other suitable provisions. I have taken the period of thirty days from the last Life Annuity Inrolment Act.

The different forms of registries will be all placed in sequel hereafter.

94.

Any grantee may, at the time of the execution of his assurance, require a memorandum of it to be endorsed upon the instrument or document conferring or certifying the grantor's title to his estate, and to be signed by the grantor, or by one of them, if several; and such indorsement shall, during the above period of thirty days, be deemed equivalent to a memorial.

The object of the preceding article is, to protect the public during the short interval allowed for registry. The provision indeed applies to a rare event; but it tends to perfect the system, and the mode is an easy one. The *Code Napoleon* (Art. 2200) effects the same object by minutes, to be left with the registrar; but this leads to too much trouble and expense for so fleeting a purpose. The expression of—"document conferring or certifying title," is in anticipation of regulations respecting pedigrees, which will appear hereafter.

95.

A memorial, written on vellum or parchment, shall be registered of every will affecting land, with the Clerk of the Peace for the county, or for each county where the land lies, before any entry can be made, or action

brought, by the devisee. Every such last memorial shall contain the date of the will, the name and description of the testator ; also of the devisee, or, where there are several, then of the devisee registering the will ; the particular land affected by it in the county in question ; or the parishes or places where such land lies ; and the ecclesiastical court where such will is proved ; in the form or to the effect expressed in Art. 102 ; but with any additions or alterations which the nature of the case may require.

Art. 95. It was found so difficult to fix an express period for registering wills, under the various circumstances of the absence, legal incapacity, or future interest of the devisee, that I at length adopted for this purpose, the time of asserting his right. Whenever this can be done, the will may be registered with equal facility, and the necessity will always ensure the performance.

The testamentary power over personal estate was part of our common law ; while the capacity to devise land was conferred only by means of the legislative enactments in Hen. VIII. and Car. II. The former right consequently drew with it the functions of authenticating and keeping the will ; and these were assumed by the episcopal authorities, in respect of their right to distribute the surplus of the personalty, after payment of debts, *in pios usus*. This accounts for, but does not justify

the present inconvenient practice of depositing the original will, either in the bishop's court, where the deceased has not left goods to the aggregate value of five pounds, in different dioceses; or, where they exceed that sum, and thus constitute what are called *bona notabilia*, in the Prerogative or Archbishop's Court of *the Province* where the testator died. It would answer no practical purpose to dwell upon the unreasonableness of the rule itself, now that the residue goes either to the legatees or the next of kin; or upon the unsuitableness of the above trifling sum to the worth of the personalty of even the poorest testator of the present day. What I have to urge is, the useless injury occasioned by it to landed titles. These, after the personal assets are distributed, constitute the only property to which the will relates. And yet, a will of land in Westmoreland may be deposited at Doctor's Commons; or a will of land in Cornwall at York; from either of which it must be brought to the county in question, whenever wanting to establish the title. The forms and mode of administering personalty (mixed up as they are with the stamp duties) are now too inveterately settled, to think of disturbing them; but, surely, it would greatly ease landed titles, in point both of proof and security, if, after the personal assets were distributed, (specifying a period for this purpose, say three years,) the original will were removed from the ecclesiastical court to the

Register of the county where the land devised ; or, if in several counties, where the greatest amount in value lies.

96.

1. *Where land is claimed by descent, the alleged heir, or some person legally authorized on his behalf, must, before entry or action, register, with the Clerk of the Peace for the county, or for each county, where the land lies, a pedigree, written on vellum or parchment, exhibiting the relationship, through all its degrees, between himself and the intestate ; authenticated, as far as practicable, by proper extracts from parish registries, of baptisms, marriages, and burials ; and by documentary proofs of intestacies, and other necessary facts, with their respective dates ; to which pedigree shall be added a description of the particular land claimed, or of the parishes or places where it lies, within the county in question ; in the form or to the effect expressed in Art. 103, with any additions or alterations which the nature of the case may require.*

2. *Registries of pedigrees may be amended by or on the behalf of the alleged heir, once within three years after registering the original pedigree.*

3. *A pedigree, registered as above ; whether amended or not, shall not be conclusive upon the claimant ; but the documents stated therein shall be deemed to be admitted by him.*

The necessity of registering pedigrees of descents, with their proofs, has been already more than once expressed; they will tend as much to the future security of titles, as to the completion of the system of registry. The institution being novel, the foregoing regulations are chiefly submitted as topics for discussion. It would be improper to conclude the heir as to the facts of his pedigree: for his own sake, and that of his title, he would render it as perfect as possible, and should be allowed a reasonable period for that purpose. At the same time, it would greatly shorten proof, if he were bound by his own allegations.

97.

1. *A memorial, written on vellum or parchment, may be registered of any judgment or recognisance, with the Clerk of the Peace for the county, or for each county, where any land of the defendant, or the cognizor, lies. Every such memorial shall contain the date of the judgment or recognisance, the names and descriptions of the parties, and the sum adjudged, or the debt acknowledged thereby. Every judgment or recognisance shall bind the land, from the time only of the registry thereof in the county where the land lies.*

2. *The registry shall continue in force for ten years only; but it may be renewed for the like term, before the actual determination thereof. Satisfaction may at any*

time be entered on the registry, by the plaintiff or the cognisee, or their respective sub-claimants. In like manner the sentence of a competent court of justice, reversing the judgment, or annulling the security, may be registered by the defendant or the cognizor.

1. The first objects are, the certainty and the publicity of the lien; these will be best obtained by allowing it to operate from the period of the registry only. It lies with the person who will benefit by it, to render it available, as speedy as possible.

2. These regulations are borrowed from the *Code Napoleon*, Art. 2154-2157, with some alterations.

98.

A memorial, written on vellum or parchment, may be registered of any written contract for the purchase of land, with the Clerk of the Peace for the county, or for each county, where the land contracted for lies. Every such memorial shall contain the date of the contract, the names and descriptions of the parties to it, and the particular land contracted for within the county in question, or the parishes or places where such land lies, in the form or to the effect expressed in Art. 105, but with any alterations or additions which the nature of the case may require. Every such contract shall take precedence of all subsequent assurances, liens, and agreements, from the date of its registry.

Art. 98. From incompleteness of title or other causes, contracts often remain unperformed for a considerable time. During this period it is in the vendor's power to defeat them, by actual conveyance of the land, or by confessing judgments or executing recognisances to strangers. It is to prevent this risk, that the proposed option is given to purchasers; but without making the registry imperative.

99.

Memorials, to be registered pursuant to the preceding articles, shall be signed as follows, viz., under Art. 101, by the grantor; under Art. 102, by the devisee, or by one of the devisees, or his guardian, or committee; under Art. 103, by the alleged heir or his guardian, committee, or attorney; under Art. 104, or 105, by either of the parties to the transaction. Every such signature shall be attested by one subscribing witness.

100.

Upon the registering of any memorial, the deed, or recognisance, or contract, where it concerns any of these assurances; and where it is of a will, an official copy of the will, from the ecclesiastical court where it shall be proved; and where of a pedigree, a duplicate of such pedigree, shall be severally produced to the Clerk of the Peace, or his deputy, who shall endorse thereon, and sign

a certificate of such memorial, specifying the day and hour of registering the same, and the book, page, and number wherein it is entered.

101.

FORMS OF MEMORIALS. (a)

1. *A Memorial of*

A Deed, dated 1st January, 1826, and made between A. B., of of the one part, and C. D., of of the other part, being *a sale* by the said A. B., to the said C. D., of a piece of pasture land containing five acres, situate in the parish of E., in the county of F., and occupied by G. H. as tenant.

2. *A Memorial of*

A Deed, dated &c., and made &c., being *a charge* by the said A. B., in favour of the said C. D., of

{	the capital sum of 1000 <i>l.</i> with interest,	}
	or	
{	an annuity of 100 <i>l.</i> for the life of the said C. D.,	}

upon a farm, consisting of a messuage and two hundred acres of land, situate in the parish of E., in the county of F., and occupied by the said A. B.

(a) The three first memorials are all of deeds. They comprise the different transactions of sales, mortgages, and settlements.

3. *A Memorial of*

A Deed, dated 1st January, 1826, and made between A. B., of of the one part, and C. D., of of the other part, being a settlement made by the said A. B. upon his marriage with the said C. D., of a mansion, out-offices, pleasure-grounds, and several parcels of arable and pasture land adjoining and near thereto, containing in the whole five hundred acres, situate in, &c., and now occupied by the said A. B.

102.1. *A Memorial of*

The last Will, dated 29th September, 1825, of A. B., late of containing a devise to C. D., of of a messuage with its outhouses and garden, situate in the town of E., in the county of F., then occupied by G. H., and now by I. K., as successive tenants. Proved in the Prerogative Court of Canterbury, on 1st November, 1825. (a)

2. *A Memorial of*

The last Will, dated 1st December, 1825, of A. B., late of (who was entitled, at his death, to a messuage and lands, composing a farm called the Hope, containing

(a) This is meant as the memorial of a *specific* devise.

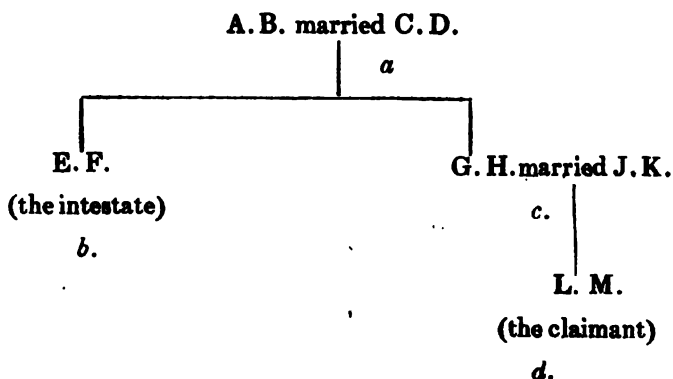
Y

one hundred acres, situate in the parish of C., in the county of E., then occupied by E. F. as tenant, and a salt-pit and works in the parish of G., in the same county, then occupied by himself, containing a devise of all his (the said testator's) real estates whatsoever and wheresoever to K. L. for his life, subject to certain yearly and capital charges thereon, with dispositions over. Proved in the Episcopal Court of London, on 10th January, 1826 (a).

103.

A Memorial of

A Pedigree, whereby L. M., of claims to be entitled as the nephew and heir of E. F., of who died intestate on 25th March, 1825, to all &c., to which premises the said E. F. was entitled at his death.



(a) This is meant as the memorial of a *general* devise.

Proofs.

- a. Subjoin an extract of registry of A. B.'s marriage.
- b. Subjoin extracts of registries of the baptism and burial of E. F., with an official note of the administration to his personalty, as proof of his intestacy.
- c. The like of the baptism, marriage, burial, and intestacy of G. H.
- d. The like of the baptism of L. M.

104.

A Memorial of

A Judgment in an action of assumpsit in the Court of King's Bench, between A. B., of plaintiff, and C. D., of defendant, wherein final judgment was entered up on 10th November, 1825, for 500*l.*, against the said C. D.

2. A Memorial of

A Recognisance, dated 1st January, 1826, whereby A. B., of acknowledged himself to be indebted to C. D., of in 500*l.* to be paid with interest as therein mentioned.

105.

A Memorial of

An Agreement, dated 1st January, 1826, whereby A. B.,

of contracted to sell to C. D., of a messuage and five parcels of land, containing together fifty acres, called Highlands, situate in the parish of E., in the county of F., with the great tithes thereof, and discharged of land-tax.

106.

No notice, either express or implied, shall give validity to any unregistered deed; nor, while a will or a pedigree, remains unregistered, to any devise or descent; nor shall any judgment or recognisance affect land, in consequence of any such notice, until registry; nor shall any notice affect the priorities given by registries, to any deeds, judgments, recognisances, or contracts.

107.

The Clerk of the Peace may testify, by a negative certificate, the non-existence of any registry of a specified description.

The utility of this regulation is self-evident. It has long been a desideratum in practice.

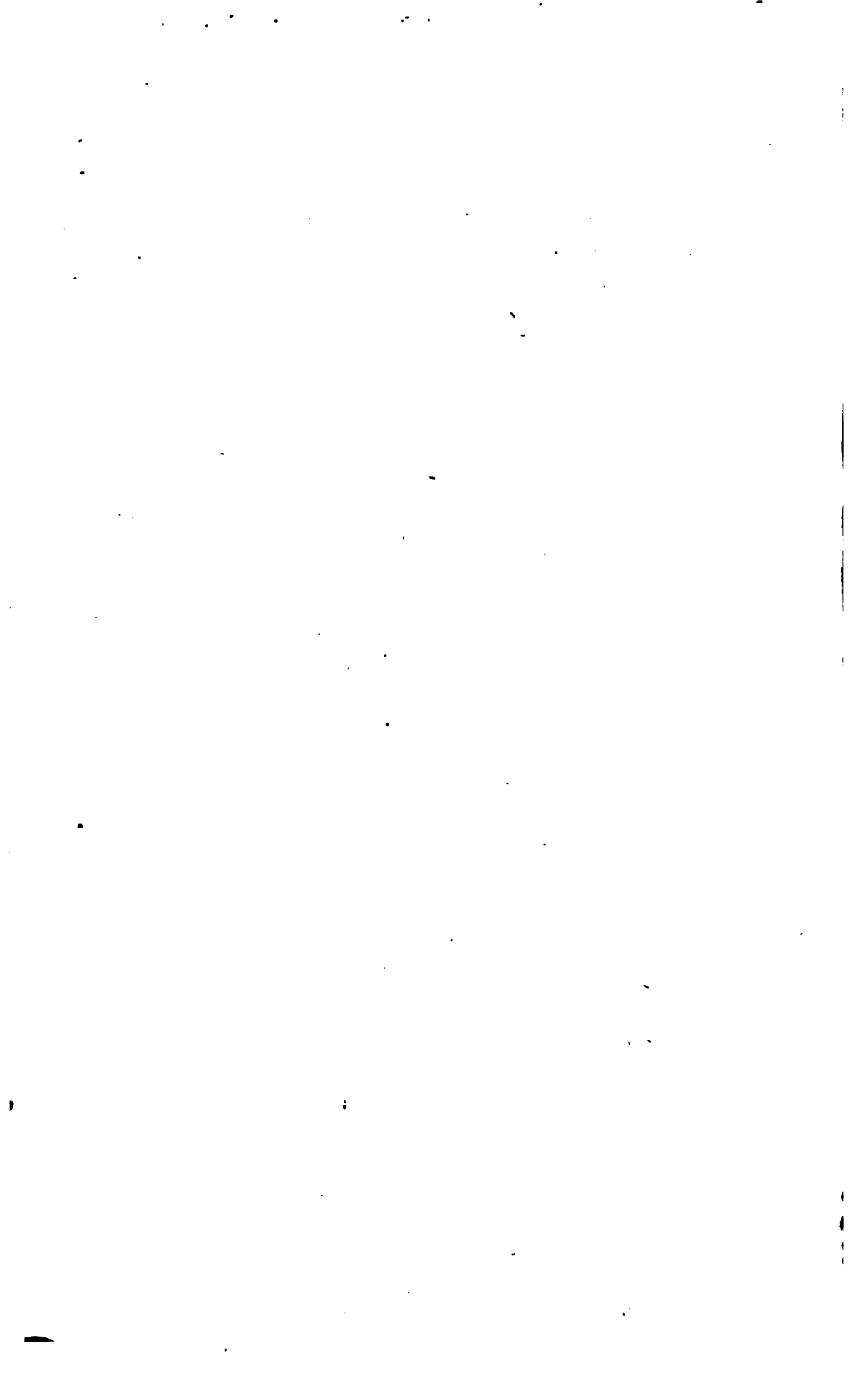
108.

The foregoing articles respecting registry do not extend to leases for any term not exceeding twenty-one years, at

rack-rent, accompanied with the possession ; nor to any assignment thereof.

It has been questioned whether, under the existing laws, the above exception extends to *assignments* of leases, where the property has been improved.

APPENDIX.



APPENDIX.

laterals in the 6th, or any higher
degree, unto the 12th inclusive.

21

The State.



FORMS OF

DIFFERENT MODES OF A CONVEYANCE TO A PURCHASER UNDER THE PRESENT LAWS.

1. *By Lease and Appointment and Release, with Assignment of term to attend, &c.*

The Lease.

THIS INDENTURE made the 24th day of March, in the year of our Lord, 1826, Between Andrew Allen, of the one part, and Benedict Butler, of the other part, Witnesseth, that for and in consideration of the sum of five shillings of lawful British money by the said Benedict Butler in hand paid to the said Andrew Allen at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged. He the said Andrew Allen Hath bargained and sold, and by these presents Doth bargain and sell unto the said **Parcels.** Benedict Butler All that messuage or dwelling-house, with the outbuildings, barns, gardens, and other appurtenances thereto belonging. And all those several pieces or parcels of arable meadow and pasture land to the said messuage or dwelling-house belonging to therewith occupied. All which said messuages, lands, and premises contain in the whole five hundred acres, and are situate, lying, and being in the parish of Weston, and county of Salop, and were late in the holding of George Gatfield, and are now in the occupation of William Woodrow, or his undertenants. And the same do together form or make a farm commonly called or known by the name

ASSURANCES.

PROPOSED FORM OF A CONVEYANCE TO A PUR- CHASER.

THIS DEED made the 25th day of March, 1826, Between Andrew Allen, of of the one part, and Benedict Butler, of of the other part, Witnesseth, that in consideration of 1000*l.* sterling, by the said Benedict Butler, now paid to the said Andrew Allen, for the absolute purchase of the property hereinafter mentioned, The said Andrew Allen Doth SELL AND CONVEY unto the said Benedict Butler, All that messuage with the outbuildings, garden, and other appurtenances thereto belonging, And all those several parcels of arable meadow and pasture land therewith held; which premises contain in the whole five hundred acres, and are situate in the parish of Weston, in the county of Salop, and are now occupied by William Woodrow, And the same do together form a farm usually called the Hope Farm, All which messuages and lands are particularly described in the Schedule hereto, by the names, quantities, qualities, situations, and other circumstances necessary for the distinction thereof.

The word "Deed," being a primitive English expression, taken in an established sense, is substituted for that of *Indenture*, indicative merely of the rude and long obsolete practice of cutting the instrument in two, in a serrated form, (*instar*

of the Hope Farm. Together with all and singular houses, outhouses, edifices, buildings, yards, ways, paths, passages, waters, watercourses, hedges, ditches, fences, lands, meadows, leasows, pastures, feedings, woods, underwoods, commons, common of pasture, profits, privileges, advantages, and appurtenances whatsoever to the messuage or tenement, lands, and other hereditaments hereby bargained and sold, or intended so to be, or any part thereof belonging, or in any wise appertaining, or to, or with, the same, or any part thereof, now or heretofore demised, used, occupied, or enjoyed. And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the aforesaid premises. To Have and to Hold all and singular the messuages, lands, and other hereditaments and premises hereby bargained and sold, or intended so to be, and every part thereof unto the said Benedict Butler, his executors, administrators, and assignees, from the day next before the day of the date of these presents for and during and unto the full end and term of one whole year from thence next ensuing and fully to be complete and ended, Yielding and paying therefore unto the said Andrew Allen, his heirs and assigns, the yearly rent of one peppercorn at the end of the said term if the same shall be lawfully demanded, To the intent and purpose that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said Benedict Butler may be in actual possession of the premises hereby bargained and sold, and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises and every part thereof, To and upon the uses and trust to be declared thereof, by a certain Indenture already prepared and engrossed, intended to bear date the day next after the day of the date hereof, and to be made or ex-

Habendum
for a year.

To enable the
bargainee to
accept a re-
lease.

dentium), each party taking a part, to be rejoined as occasion might require.

For the remaining part of the preceding form, I shall do little more than refer to the understated articles in the code, which will explain the reasons for *the omissions* that will appear in it to one conversant in the present lengthy mode of conveyancing.

The omission of words of limitation to the *heir*, or any expression of the inheritance, is vindicated in the comment on Art. 41.

Covenants for the title, and for the production of the title-deeds, are rendered needless by Arts. 74 and 76, which see, with their comments.

The long train of "*general words*" used in our conveyances are not to be found in *Maddock's Formulare Anglicanum*, nor in the *Formulaire François*; but they seem peculiar to our modern English forms. As incidents to the property, their mention is, in reality, useless; at all events, they are included in the word "*appurtenances*."

Any concluding form is in itself needless. It is omitted in bonds with obligations, and in promissory notes. The endorsement of a note of attestation, with the names and additions of the witnesses is, however, requisite, (see Art. 28), and a receipt for the consideration-money is very advisable, by way of caution to the seller.

pressed to be made between the said Andrew Allen of the first part, the said Benedict Butler of the second part, and David Danvers, Esquire, of the third part, in which said indenture, or the schedule thereto, the said premises and particularly the lands are more fully and at large described. In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

The Appointment and Release.

THIS INDENTURE made the 25th of March, in the year of our Lord, 1826, Between Andrew Allen, of
 of the first part, Benedict Butler, of of the
 second part, and David Danvers, of of the third
 part. Whereas by Indentures of lease and release dated
 respectively on or about the 1st and 2d days of January, 1824, The release being made or expressed to be made, Between Francis Forester, esq., [the previous vendor, &c.] of the first part, the said Andrew Allen, of the second part, and George Gordon, gent., [the then trustee to prevent dower] of the third part, In consideration of the sum of paid by the said Andrew Allen to the said Francis Forester, in full for the absolute purchase of the hereditaments thereafter released, All and singular the messuage, or tenement, and farm, lands, and other hereditaments situate and being in the parish of Weston, in the county of Salop, hereinafter described, and intended

to be hereby conveyed, with the appurtenances thereto belonging, were conveyed and assured by the said Francis Forester, in manner therein mentioned, unto the said Andrew Allen, his heirs, and assigns, To such uses, upon and for such trusts, intents, and purposes, and with and subject to such powers, provisoes, and declarations, as the said Andrew Allen by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more witnesses should direct, limit, or appoint, And until and in default of such direction, limitation, or appointment, and so far as the same, if incomplete, should not extend, to the use of the said A. Allen, and his assigns, during his life, with a limitation to the said George Gordon, his executors and administrators, during the life of the said A. Allen, in trust for him the said A. Allen, and his assigns, with remainder to the only use of the said A. Allen, his heirs and assigns for ever. And whereas the said B. Butler hath contracted and agreed with the said A. Allen, for the absolute purchase in fee simple, in possession free from incumbrances, of the said messuage or tenement, lands, and other hereditaments, comprised in the before-recited Indentures, at or for the price or sum of one thousand pounds, And he the said B. Butler, is desirous that the hereditaments so by him contracted for shall be limited and assured to and upon the uses and trust, and with the power hereinafter declared and contained thereof, in order to prevent any wife of his from being dowerable thereout. Now this Indenture witnesseth, that in pursuance of the said agreement, and for and in consideration of the sum of one thousand pounds of lawful British money by the said B. Butler to the said A. Allen, in hand, well and truly paid at or upon the execution of these presents, the receipt whereof in full for the absolute

With limitations intended to prevent dower.

In default.

Contract for Purchase.

Purchaser desirous to prevent dower.

Witness.

In consideration of purchase-money.

purchase of the messuage or tenement, lands, and other hereditaments hereby conveyed, or intended so to be, he the said A. Allen doth hereby acknowledge, and of and from the same sum and every part thereof doth acquit, release, and discharge the said B. Butler, his heirs, executors, administrators, and assigns for ever by these presents. And pursuant to and by virtue and in exercise of the power and authority to the said A. Allen by the said recited Indenture of the 2d day of January, 1824, for this purpose given or limited as hereinbefore mentioned, and all other powers and authorities whatsoever, enabling him in this behalf, he the said A. Allen, by this deed or writing, sealed and delivered by him in the presence of and attested by the two persons whose names are intended to be endorsed hereupon, as witnesses in that behalf, doth irrevocably direct, limit, and appoint, that all and singular the messuage or tenement, lands, and other hereditaments, situate and being in Weston aforesaid, comprised in the said recited Indentures of the first and second days of January, 1824, and therein and hereinafter particularly described and intended to be hereby released, with their several appurtenances, shall from henceforth go and remain, and that the said Indenture of the 2d day of January, 1824, shall operate and enure to and upon the uses and trust, and with the power hereinafter declared and contained, of and concerning the said messuage or tenement, lands, and other hereditaments for the sole benefit of the said B. Butler, his heirs and assigns. And this Indenture also Witnesseth, that in further pursuance of the said recited agreement, and in consideration of the said sum of one thousand pounds paid to the said Andrew Allen, by the said Benedict Butler, as hereinbefore is mentioned, and for the further and better assuring the said messuages or tenements, lands, and other

Vendor

appoints,

and

hereditaments to the uses and in manner hereinafter mentioned, He the said A. Allen Hath granted, bargained, sold, aliened, released, and confirmed, And by
released. these presents, Doth grant, bargain sell, aliene, release, and confirm unto the said B. Butler, (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. Allen, in consideration of five shillings by Indenture bearing date the day next before the day of the date of these presents for the term of one whole year, commencing from the day next before the day of the date of the same Indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and his heirs, All that messuage or dwelling-house, with the outbuildings, barns, garden, and other appurtenances thereto belonging, And all those several pieces or parcels of arable meadow and pasture land to the said messuage or dwelling-house belonging or therewith occupied, All which said messuage, lands, and premises contain in the whole five hundred acres, and are situate lying and being in the said parish of Weston, in the said county of Salop, and were late in the holding of George Gatfield, and are now in the occupation of William Woodrow, or his under-tenants, And the same do together form or make a farm commonly called or known by the name of the Hope Farm, All which premises are comprised and set forth in the Schedule to these presents, and are therein particularly described by the names, quantities, qualities, situations, and other circumstances necessary for the distinction thereof respectively, Together with all and
Parcels. singular houses, outhouses, edifices, buildings, yards, ways, paths, passages, waters, water-courses, hedges, ditches, fences, lands, meadows, leasows, pastures, feedings, woods, underwoods, commons, common of pasture, profits, privileges, advantages, and appur-
General words.

tenances whatsoever to the messuage or tenement, lands, and other hereditaments hereby released or intended so to be or any part thereof belonging or in any wise appertaining, or to or with the same or any part thereof now or heretofore demised, used, occupied, or enjoyed, And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the aforesaid messuage or tenement, lands, and other hereditaments, And all the estate, right, title, interest, use, trust, property, benefit, claim, and demand whatsoever of him the said A. Allen, in, to and upon the

Habendum. same hereditaments, To have and to hold the messuage or tenement, lands, and all other the hereditaments hereby released, or intended so to be, and every part thereof, unto the said B. Butler, his heirs and assigns for ever, To and upon the uses and trust, and with the power hereinafter declared and contained thereof.

Limitation
of the uses of
appointment
and release.

And it is hereby agreed and declared between and by the parties hereto, that as well the direction and appointment, as also the grant and release hereinbefore contained, shall severally operate and enure, And all and singular the messuage or tenement, lands, and other hereditaments, hereby appointed and released, or intended so to be, shall from henceforth go and remain

First, to
purchaser's
appointment.

To such uses upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as the said B. Butler by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of two or more witnesses, shall from time to time direct, limit, or appoint, and in the mean

In default to
purchaser
and a trustee,
so as to
prevent the
legal fee from
vesting in
the former.

time, and until and also in default of any such direction, limitation, or appointment, and so far as the same, if incomplete, shall not extend, to the use of the said B. Butler, and his assigns, during his life, without im-

Covenants
for Title.
(vis.) That

Vendor
is lawfully
seised ;

Has power to
convey ;

peachment of waste, and after the determination of that estate, by any means in his lifetime, to the use of the said D. Danvers, his executors and administrators during the life of the said B. Butler, In trust, nevertheless, for him the said B. Butler, and his assigns, and from and after the determination of the estate so hereby limited in use to the said D. Danvers, his executors and administrators as aforesaid, to the only use of the said B. Butler, his heirs and assigns for ever, And to and for no other use, intent, or purpose whatsoever. And the said A. Allen for himself, his heirs, executors, and administrators, Doth grant, covenant, promise, and agree to and with the said B. Butler, his heirs and assigns, by these presents in manner following (that is to say) that for and notwithstanding any act, deed, matter, or thing whatever by him the said A. Allen (a) or any person or persons lawfully claiming from under or in trust for him, made, done, committed, executed, or suffered to the contrary, he, the said A. Allen, now is lawfully, rightfully, and absolutely seised of or well entitled to the messuage or tenements, lands, and other hereditaments hereby conveyed, or intended so to be, and every part thereof, for an absolute and indefeasible estate of inheritance in fee simple, without any condition, use, trust, power of revocation, or other restraint, cause, matter, or thing whatsoever, to alter, defeat, incumber, revoke, or make void the same, except his general power of appointment hereby exercised as aforesaid. And that for and notwithstanding any such act, deed, matter, or thing, as aforesaid, he, the said A. Allen, now hath in himself good right, full power, and

(a) As Allen, on purchasing, took covenants for the title, which pass with his conveyance, the rule is, that he shall not covenant beyond his own acts.

lawful and absolute authority to limit, convey, and assure the messuage or tenement, lands, and other hereditaments, hereby conveyed, or intended so to be, with their appurtenances, To and upon the uses and trust and with the power hereinbefore declared and contained thereof, for the sole benefit of the said B. Butler, his heirs and assigns, according to the true intent of these presents. And that it shall and may be lawful to and for the said B. Butler, his appointees, heirs, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the messuage or tenement, lands, and other hereditaments hereby conveyed, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, eviction, claim, or demand whatsoever, of or by the said A. Allen, or any person or persons lawfully claiming from under or in trust for him. And that free and clear of and from and against all former and other gifts, grants, bargains, sales, powers, jointures, dowers, uses, trusts, entails, wills, statutes, judgments, executions, rents, sums of money, forfeitures, re-entries, and all other estates, titles, troubles, charges, and incumbrances whatsoever, had, made, executed, or suffered by the said A. Allen, or any person or persons lawfully claiming, or to claim from under or in trust for him, And further, that he the said A. Allen, and his heirs, and all and every other persons and person whosoever, having or claiming, or who shall or may have or claim any estate, right, title, or interest at law or in equity, in, to or out of the messuage or tenement, lands, and other hereditaments hereby released, or intended so to be, or any part thereof, from under or in trust for him the said A. Allen, shall and will from time to time, and at all times

For

quiet
enjoyment;

Free from
Vendor's former
acts and
incumbrances;

And for
further assurance.

hereafter, upon every reasonable request, and at the proper costs and charges of the said B. Butler, his heirs, appointees, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and singular such further and other lawful and reasonable acts, deeds, things, conveyances, and assurances in the law, whatsoever, for the further, better, and more absolutely limiting, conveying, and assuring the messuage or tenement, lands, and other hereditaments, hereby conveyed as aforesaid, or intended so to be, and every part thereof, with their appurtenances, To and upon the uses and trust and with the power hereinbefore declared and contained thereof, for the sole benefit of the said B. Butler, his appointees, heirs, and assigns, or otherwise, as by him or them or his or their counsel in the law, shall be reasonably devised or advised and required (a).

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The Schedule referred to by the above written Indenture.

Nos. on Plan.	Names of Fields.	Quality.	Quantity.	Tenant's names.	Observations.

(a) In order somewhat to equalize the different forms of conveyance, the vendor's covenant for production of title deeds is added to the next set, namely, to the declaration of the use of a fine.

The Assignment of the Term.

THIS INDENTURE, made the 25th day of March, in the
 The termor. year of our Lord 1826, between John Johnson, of
 The seller. of the first part, Andrew Allen, of of
 The per- the second part, Benedict Butler, of of the third
 chaser. part, and Humphrey Hobart, of of the fourth
 The proposed trustee of the part. Whereas, by an indenture, dated on or about the
 term. 10th day of January, 1760, and made, or expressed to
 Recital of. be made, between Arthur Atkins, Esq. of the one part,
 and Benjamin Bradley, Gent. of the other part; for
 the considerations therein expressed, the said Arthur
 Atkins did bargain, sell, and demise unto the said
 Benjamin Bradley, his executors and administrators,
 All that messuage, or farm-house, lands, and other
 premises, situate and being in the parish of W. in
 the county of S. comprised in the indentures of lease
 and appointment, and release, the latter of equal
 date herewith, hereinafter recited, and therein and
 hereinafter described, with the appurtenances thereto
 belonging, To hold the same unto the said Benjamin
 Creation of Bradley, his executors, administrators, and assigns, from
 term. thenceforth for the term of one thousand years, but by
 way of mortgage only, for securing to him and them the
 payment of the sum of five hundred pounds, and interest,
 on or at the days or times therein mentioned, and since
 past; which sum and interest, though not paid at the
 time appointed for that purpose, have been long since
 Ultimate satisfied. And whereas, under and by virtue of divers
 vesting. mesne assignments, and certain acts in law, and ultimately an indenture, dated on or about the 30th day of

The then
termor.

Death of
trustee.

Limited ad-
ministration
as to the
time.

Recital of
purchase-
deed.

January, 1824, and made, or expressed to be made, between Charles Crawford, Gent. of the first part, Francis Forester, Esq. of the second part, the said A. Allen, of the third part, and George Hanbury, Gent., since deceased, of the fourth part; all and singular the said messuage, lands, and other premises, comprised in the said term of one thousand years, became vested in the said George Hanbury, for all the then residue of the same term; but in trust for the said A. Allen (who had then lately purchased the same premises in fee-simple), his heirs, and assigns; and to attend and protect the reversion and inheritance of the same premises. And whereas the said George Hanbury died in or about the month of April, 1824, intestate; And whereas there is now no general personal representative of the said George Hanbury; And whereas the Prerogative Court of the Archbishop of Canterbury hath granted unto the said John Johnson letters of administration, bearing date on or about the 5th day of March last, of the personal estate and effects of the said George Hanbury, limited so far as respects the messuage, lands, and other premises comprised in the said term of one thousand years; but in trust as aforesaid. And whereas, by indentures of lease and appointment, and release, bearing date respectively, the lease the day next before the day of the date of the appointment and release, and the appointment and release equal date with, but executed before these presents, and made, or expressed to be made, between the said A. Allen of the first part, the said B. Butler of the second part, and David Danvers, Esq. of the third part, in consideration of the sum of one thousand pounds, paid by the said B. Butler to the said A. Allen, in full, for the absolute purchase of the hereditaments thereafter released; All that messuage or dwelling-house, with the outbuildings,

garden, and other appurtenances thereto belonging; and all those several pieces and parcels of arable, meadow, and pasture land, to the said messuage or dwelling-house belonging, or therewith occupied, all which said messuage, lands, and premises, contain in the whole five hundred acres, and are situate, lying, and being, in the said parish of W., in the county of S., and were late in the holding of George Gatfield; and are now in the occupation of William Woodrow, or his under-tenants; and the same do together form and make a farm commonly called or known by the name of the Hope Farm. All which messuages, and pieces or parcels of land, are comprised and set forth in the schedule to the now-recited indenture of release; and also in the schedule to these presents; and are therein respectively particularly described, by the names, quantities, qualities, situations, and other circumstances, necessary for the distinction thereof respectively; with the appurtenances thereto belonging, are, or are expressed to be limited, conveyed, and assured, by the said A. Allen, in manner therein mentioned, unto the said B. Butler his heirs, and assigns, for ever. To such uses, upon and for such trusts, intents, and purposes, as the said B. Butler, by such deed or deeds, writing or writings, as therein mentioned shall direct, limit, or appoint; and until, and in default of such direction, limitation, or appointment; to the use of the said B. Butler, and his assigns, during his life, with a limitation to the said D. Danvers, his executors, and administrators, during the life of the said B. Butler, in trust for him the said B. Butler and his assigns, with remainder to the only use of the said B. Butler, his heirs, and assigns for ever. And whereas it hath been agreed between the parties hereto, that the said messuage, lands, and other premises, comprised in the before-recited indentures, shall be

Agreement
to assign.

assigned unto the said Humphrey Hobart, for all the residue of the said term of one thousand years, upon the trusts hereinafter declared thereof, for the benefit of the said B. Butler, his appointees, or heirs, and assigns, Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, and also in consideration of the sum of ten shillings, of lawful British money, by the said Humphrey Hobart now paid to the said John Johnson, the receipt whereof is hereby acknowledged, he, the said John Johnson, at the request and by the direction of the said A. Allen, and upon the nomination of the said B. Butler, testified by their severally executing these presents, hath bargained, sold, assigned, and set over; and by these presents doth bargain, sell, assign, and set over unto the said Humphrey Hobart, his executors, and administrators, All and singular the messuage, lands, and other premises, situate and being in the parish of W. aforesaid, comprised in the said recited indentures of lease and appointment, and release; the latter of equal date herewith; and therein and hereinbefore described, the same being the premises comprised in the said term of one thousand years, created by the said indenture of the tenth day of January, 1760; and now vested in the said John Johnson, as the limited administrator of the said George Hanbury, for all the residue of the same term, in trust, as aforesaid; with the appurtenances thereto belonging; and all the estate, right, title, interest, term, and terms of years yet to come, and unexpired, property, benefit, claim, and demand whatsoever, of him the said John Johnson, into and upon the same premises; To have and to hold the messuage, lands, and all other the premises hereby assigned, or intended so to be, and every part thereof, unto the said Humphrey Hobart, his executors, administrators, and assigns from henceforth for

Witness.

Parcels.

Habendum.

355

2 A 2

and during all the rest and residue now to come and unexpired of the said term of one thousand years, in trust nevertheless for the said B. Butler, his heirs, appointees, and assigns, and to assign or otherwise dispose of the same as he or they shall from time to time order and direct, and in the mean time in trust to permit the rest and residue of the same term to wait upon and attend the reversion and inheritance of the messuages, lands, and other premises hereby assigned or intended so to be, so as to be subservient thereto, and to protect the same from all mesne and intervening incumbrances if any such there be, And the said John Johnson doth hereby for himself his heirs, executors, and administrators, covenant and declare with and to the said H. Hobart his executors, administrators, and assigns that he the said J. Johnson hath not heretofore made, done, committed, or suffered any act, deed, matter, or thing whatsoever whereby or by reason or means whereof the messuage, lands, and other premises hereby assigned or intended so to be or any part thereof are, is, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. In witness, &c.

In trust for Purchaser

and

to attend, &c.

Covenant from the Assignor that he has not incumbered.

2. *Conveyance by Fine, with Declaration of its Uses.*

The Deed of Covenant and Declaration.

THIS INDENTURE made the 25th day of March, in the year of our Lord, 1826, Between Andrew Allen, of
and Elizabeth, his wife, of the first part,
Benedict Butler, of of the second part,
and David Danvers, of of the third part.—
Whereas the said A. Allen and Elizabeth, his wife, are seised or otherwise well entitled in fee simple in possession free from incumbrances in right of her the said Elizabeth, of or to the messuage, land, and other hereditaments, situate and being in the parish of Stoke, in the county of Worcester, hereinafter described and intended to be hereby conveyed or assured. And whereas the said B. Butler hath contracted and agreed with the said A. Allen and Elizabeth, his wife, for the absolute purchase in fee simple in possession free from incumbrances of the said messuage, land, and other hereditaments, at B., aforesaid, at or for the price or sum of five hundred pounds, and he the said B. Butler is desirous that the hereditaments so contracted for shall be limited, &c. [*to uses to prevent dower as in the preceding form of appointment and release.*] Now this Indenture witnesseth, that in pursuance of the said agreement, and for and in consideration of the sum of five hundred pounds of lawful British money by the said B. Butler to the said A. Allen and Elizabeth, his wife, in hand well and truly paid at or upon the execution of these presents, the receipt whereof in full for the absolute purchase of the messuage, land, and other

Witness.

Covenant for
Vendor and
wife to levy
a fine.

Parcels.

Fine to enure

hereditaments hereby assured or intended so to be, they the said A. Allen, and Elizabeth, his wife, do hereby acknowledge, and of and from the same sum and every part thereof do and each of them doth acquit, release, and discharge the said B. Butler, his heirs, executors, administrators, and assigns for ever by these presents, He the said A. Allen doth hereby for himself and his heirs, and for the said Elizabeth, his wife (she hereby consenting thereto) covenant and agree with the said B. Butler, his heirs and assigns, that they the said A. Allen and Elizabeth, his wife, shall and will, as of Hilary term last, or in or as of Easter term now next following, acknowledge and levy before the Justices of his Majesty's Court of Common Pleas at Westminster, unto the said B. Butler, and his heirs, one or more fine or fines *Surcognisance de droit come ceo, &c.*, whereupon proclamations shall be duly made according to the statute in that case made and provided of, All that messuage or dwelling-house, with the outbuildings, garden, and other appurtenances thereto belonging, and all that piece or parcel of pasture lying behind and adjoining to the same premises, and containing three acres or thereabouts, all which said premises are situate, lying, and being in the said parish of Stoke, in the said county of Worcester, and are now in the occupation of James Johnson, and of all rights, ways, paths, passages, waters, watercourses, commons, common of pasture, casements, profits, commodities, privileges, and advantages whatsoever to the said messuage, land, and premises, or any part thereof belonging or appertaining or therewith usually held, occupied, or enjoyed, by such apt and proper names, quantities, qualities, and other descriptions as shall effectually ascertain or comprise the same, And it is hereby agreed and declared between and by the parties hereto, that the fine or fines so as aforesaid or in any other manner or at any other time

To uses for
Purchaser to
prevent
dower.

Covenants
for title.

That vendors
are seised in
fee;

to be had and levied, and also all other fines and all common recoveries and assurances whatsoever which either have been or shall be made, levied, suffered, or executed of the said messuage, land, and other hereditaments, or any of them, either alone or jointly with any other hereditaments to which the parties hereto or any of them are, is, or shall be parties or a party, privies or privy, shall as to the same hereditaments or such parts thereof as shall be comprised therein respectively be and enure, and shall be adjudged, deemed, and taken to be and enure to such uses upon and for such trusts, intents, and purposes, &c., [*Here the limitations to prevent dower in the preceding deed of appointment and release should be repeated,*] And the said A. Allen, for himself, his heirs, executors, and administrators doth grant, covenant, promise, and agree to and with the said B. Butler, his heirs and assigns, by these presents in manner following (that is to say) that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said A. Allen and Elizabeth, his wife, or either of them, or by George Gordon, the late father of the said Elizabeth Allen, and who died intestate, or by any person or persons lawfully claiming from under or in trust for them, or any of them, made, done, committed, executed, or suffered to the contrary, the said A. Allen and Elizabeth, his wife, in her right, now are lawfully, rightfully, and absolutely seised or well entitled in right of her the said Elizabeth, of or to the messuage, land, and other hereditaments belonging and by the said intended fine intended to be conveyed or assured, and every part thereof, for an absolute and indefeasible estate of inheritance in fee simple without any condition, use, trust, power of revocation, or other restraint, cause, matter, or thing whatsoever, to alter, defeat, incumber, revoke, or make void the same, and that for and notwithstanding any such act, deed, matter, or thing as aforesaid, they the said A. Allen and

Have good
right to con-
vey

Elizabeth, his wife, or one of them now have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority by these presents and the said intended fine to grant, release, and convey the messuage, land, and other hereditaments hereby and by the said intended fine proposed to be assured, with their appurtenances to and upon the uses and trust and with the power hereinbefore declared and contained thereof, for the sole benefit of the said B. Butler, his heirs and assigns, according to the true intent of these

For quiet en-
joyment and
for further as-
surance."

presents. [*Add covenants for quiet enjoyment free from incumbrances, and for further assurance, as in the preceding form of appointment and release, but applying them to the acts of Allen and wife, and George Gordon, her*

Covenant to
produce title
deeds.

late father.] And moreover, that they the said A. Allen and Elizabeth, his wife, or one of them, their, or one of their heirs and assigns, shall and will from time to time and at all times hereafter, unless prevented by fire or some other inevitable accident, upon every reasonable request or notice in writing, and at the proper costs and charges of the said B. Butler, his appointees, or heirs, or assigns, or any of them, produce and shew forth, and cause and procure to be produced and shewn forth, to the said B. Butler, his appointees, or heirs, or assigns, or any of them, or to his, their, or any of their agents or attornies, or at any trial, hearing, commission, or examination in or directed by any court or courts of law or equity in England or Wales, all and every or any of the several deeds, evidences, and writings mentioned, or comprised in the schedule to these presents, which deeds, evidences, and writings relate to and concern the estate and title of and to not only the messuage, land, and other hereditaments hereby and by the said intended fine proposed to be conveyed or assured, but also certain other messuages, lands, and hereditaments of or belonging to the said A. Allen and Elizabeth, his wife, in right of the said Elizabeth, situate

and being in the said county of Worcester, and which last-mentioned hereditaments are of greater value than the premises herein comprised, when and as often as there shall be occasion to inspect or produce the same or any of them for the maintenance, making out, defending, or proving the estate, right, title, property or possession of him the said B. Butler, his appointees, or heirs, or assignees, or his or their trustee or trustees, or any of them in or to the messuage or tenement, land, and other hereditaments by these presents and the said intended fine proposed to be conveyed or assured as aforesaid, or any part thereof, and also shall and will at the like request and at the proper costs and charges of the said B. Butler, his appointees, or heirs, or assigns, or any of them cause to be made out and delivered to him, them, or any of them any copy or copies attested or unattested of all and every or any of the said deeds, evidences, and writings, and likewise shall and will in the mean time, keep and preserve the said deeds, evidences, and writings and every of them safe, whole, uncanceled, and undefaced (all losses and damages by fire or any other inevitable accident as aforesaid, only excepted). In witness, &c. [*as in the preceding form.*]

The Schedule referred to by the above-written Indenture.

The Præcipe and Concord in the Fine

Præcipe.

Worcester.
shire to wit.

COMMAND Andrew Allen, and Elizabeth, his wife, that justly and without delay they perform to Benedict Butler,

gentleman, the covenant made between them concerning one messuage, one garden, three acres of pasture, and common of pasture for all cattle, with the appurtenances in Stoke, and unless, &c.

The Concord.

AND the agreement is such (that is to say) that the said Andrew and Elizabeth his wife have acknowledged the aforesaid tenements and common with the appurtenances to be the right of him the said Benedict, as those which the said Benedict hath of the gift of the said Andrew and Elizabeth, and those they have remised and quit claimed from them the said Andrew and Elizabeth, and the heirs of the said Elizabeth to the aforesaid Benedict and his heirs for ever; and moreover the said Andrew and Elizabeth have granted for them and the heirs of the said Elizabeth, that they will warrant to the aforesaid Benedict and his heirs the aforesaid tenements and common with the appurtenances against them the said Andrew and Elizabeth, and the heirs of the said Elizabeth for ever, and for this, &c.

APPENDIX,

A SECURITY BY BOND AND MORTGAGE, AFTER THE PRESENT FORMS; THE LATTER EFFECTED BY A CONVEYANCE OF THE FEE, WITH A RIGHT TO SELL IN DEFAULT OF PAYMENT.

The Bond.

KNOW all men by these presents, that I Francis Forester, of am held and firmly bound to Charles Campbell, of in the sum of two thousand pounds of lawful British money, to be paid to the said Charles Campbell, or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated this 1st day of April, in the year of our Lord, 1826.

The condition of the above written obligation is such, that if the above bound Francis Forester do and shall well and truly pay or cause to be paid unto the above named Charles Campbell, the sum of one thousand pounds of lawful British money, with interest for the same, at the rate of five pounds for one hundred pounds for a year, on or at the following days or times, (that is to say) half a year's interest, for the said sum of one thousand pounds, at the rate aforesaid, on the 1st day of October, now next ensuing, and the said principal of one thousand pounds, and another half year's interest at the rate

No. II.

PROPOSED CHARGE OF A PRINCIPAL SUM WITH INTEREST.

THIS DEED made the 1st day of April, 1826, between Andrew Allen, of of the one, and Benedict Butler, of of the other part, witnesseth, that in consideration of five hundred pounds sterling by the said B. Butler to the said A. Allen, now lent and paid, the said A. Allen, doth charge all that messuage or dwelling house, with the outhouses and gardens thereto belonging; also the three following parcels of land thereto adjoining and therewith occupied, namely, Blackacre, being meadow, containing ten acres; Greenacre, being pasture, containing four acres two roods; and Whitacre, being arable, containing eight acres. All which said premises are situate in the parish of Stoke, in the county of Hereford, and are now in the occupation of Giles Hall, with the appurtenances thereto belonging, with the payment to the said B. Butler, of the sum of five hundred pounds, with interest at four per cent. per annum as follows, viz., half a year's interest of the same sum to be paid on the 1st day of October, now next ensuing, and the said principal sum of five hundred pounds and another half year's interest, for the same to be paid on the 1st day of April, which will be in the year 1827.

Article 58 renders the sum charged and interest a personal debt on the part of the borrower, &c. The necessary reme-

aforesaid, on the 1st day of April, then next following, and which will be in the year 1827. Then the before written obligation shall be void, and of none effect, otherwise the same shall remain in full force and virtue.

The Mortgage.

Mortgagor.	THIS INDENTURE made the 1st day of April, in the year of our Lord, 1826, Between Francis Forester, of
Mortgagee.	Esq. of the one part, and Charles Campbell, of Esq. of the other part. Whereas the said
Recital of	Francis Forester is seised, or otherwise well entitled in fee-simple in possession of or to the messuage, lands, and other hereditaments, situate and being in the parish of Orlton, in the county of Hereford, hereinafter particularly described, and intended to be hereby released.
Contract for loan on	And whereas the said Charles Campbell hath upon the application of the said Francis Forester agreed to advance and lend him the sum of one thousand pounds, at
Security of bond and mortgage.	interest, at the rate of five pounds per cent. per annum, but reducible to four pounds per cent. per annum if such interest shall be duly and regularly paid as hereinafter mentioned, upon the security of the bond or obligation of him the said Francis Forester, and of a conveyance in fee, by way of mortgage, to be made to him, of the same messuage, lands, and other hereditaments. And
Recital of Bond.	whereas the said Francis Forester, in pursuance of

dies against the real security are given by A. 60, for the principal, and by A. 61 for the interest.

The observations subjoined to the proposed form of a conveyance to a purchaser, respecting general words, covenants for the title, a concluding form, and indorsement of attestation and receipt, are equally applicable here.

the said agreement on his part, hath by his bond or obligation in writing under his hand and seal, bearing even date with these presents, become bound to the said Charles Campbell in the sum of two thousand pounds, with a condition thereunder written for making void the same on payment by the said Francis Forester, his heirs, executors, or administrators, unto the said Charles Campbell, his executors, administrators, or assigns, of the sum of one thousand pounds, with interest for the same at five pounds percent. per annum, on or at the days or times therein for that purpose expressed, being the same days or times as are hereinafter appointed for payment of the same sum and interest.

Witness.

Now this Indenture witnesseth that in further pursuance of the said recited agreement, and for and in consideration of the sum of one thousand pounds of lawful British money by the said Charles Campbell to the said Francis Forester in hand, well and truly lent and paid at or upon the execution of these presents, the receipt whereof accordingly he doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said Charles Campbell, his heirs, executors, administrators and assigns, for ever by these presents. He the said Francis Forester hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, aliene, release, and confirm unto the said Charles Campbell, (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said Francis Forester, in consideration of five shillings by indenture, &c.) and his heirs. All that messuage or dwelling-house, with the outhouses and garden thereto belonging. And all those three several pieces or parcels of land thereto adjoining, and therewith usually occupied, commonly

Mortgagor
conveys.

The deed
here referred
to is a lease
of possession
similar to
preceding
one.

called by the names, and containing the several quantities following, (that is to say) Blackacre being meadow, containing ten acres; Greenacre being pasture, containing four acres two roods; and Whitacre, being arable, containing eight acres. All which said messuage and lands are situate, lying, and being in the parish of Orlton, aforesaid in the said county of Hereford, and were late in the occupation of Richard Jennings, and are now in the occupation of Giles Hall. Together with all and singular houses, outhouses, &c., and the reversion, reversions, &c., and all the estates, &c., To have and to hold the messuage, lands, and all other the hereditaments hereby released, or intended so to be, and every part thereof unto the said Charles Campbell, his heirs and assigns, to the only use and behoof of him the said Charles Campbell, his heirs and assigns for ever. But upon and for the trusts, intents, and purposes, and with and subject to the powers and provisos following, (that is to say) Upon trust that in case the said Francis Forester, his heirs, executors, administrators, or assigns, shall and do well and truly pay or cause to be paid to the said Charles Campbell, his executors, administrators, or assigns, the sum of one thousand pounds of lawful British money, with interest for the same, at the rate of five pounds for one hundred for a year, on or at the following days or times, (that is to say) half a year's interest for the said sum of one thousand pounds at the rate aforesaid, on the 1st day of October, now next ensuing, and the said principal sum of one thousand pounds, and another half year's interest for the same at the rate aforesaid, on the 1st day of April, then next following, and which will be in the year 1827, (being such and the same days or times as are appointed for that purpose in the condition of the aforesaid bond of equal date herewith) without any

Here the general words in the preceding appointment and release should be introduced.
Habendum

to
Mortgagee
in fee.

Trusts.

If the principal and interest be regularly paid

to deduction or abatement whatsoever, then and in such case and while such interest as aforesaid shall be duly paid.

Permit mort- In trust to permit and suffer the said Francis Forester, gator to re- his heirs, and assigns, to retain the possession and receive tain posses- and take the rents, issues, and profits of the messuage, sion, and to lands, and other hereditaments hereby released or intended so to be, but without power to commit waste, until the said principal sum of one thousand pounds, shall become payable as aforesaid, and in case the same principal sum and all interest for the same shall be duly paid and discharged at the time and in manner aforesaid, upon trust thereupon, or at any time thereafter, at the request, costs, and charges of the said Francis Forester, his heirs, or assigns, to reconvey to him and them, or as he or they shall order and direct the messuage, lands, and other hereditaments hereby released, or intended so to be, and every part thereof freed and discharged from all charges and incumbrances to be made done or committed by the said Charles Campbell, his heirs or assigns in the mean time. But in case the said Francis Forester, his heirs, executors, administrators, or assigns, shall make default for the space of two calendar months or more, in payment of the said sum of one thousand pounds, or of the interest thereof or any part thereof respectively, at the times and in manner aforesaid, Then upon trust or to the intent that he the said Charles Campbell, his heirs or assigns, shall and may thereupon enter into the possession or receipt of the rents and profits of the messuage, lands, and other hereditaments hereby released or intended so to be, and shall and may (whether having previously entered or not), at any time or times after the expiration of six calendar months from the period of such default as aforesaid at his or their discretion, absolutely and to sell. sell and dispose of the same messuage, lands, and other

hereditaments, or any part or parts thereof, either by public sale or private contract, or by both of such means, in such lots parcels and manner, as he or they shall think fit, without the consent or concurrence of the said Francis Forester, his heirs, executors, administrators, or assigns, unto any person or persons whomsoever, for the best price or prices in money, that can or may be reasonably obtained for the same, and shall and may for that purpose enter into, make, and execute all necessary contracts with and conveyances to the purchaser or purchasers thereof, or as he or they shall direct, with powers to reserve a bidding or biddings upon any such sale or sales by public auction, and also to resell in manner aforesaid, any of the same hereditaments which may be contracted to be sold, but which contracts shall not afterwards be completed, and to deal with respect to such first contracts, and the deposits and damages thereon, as he or they shall think fit. And it is hereby agreed and declared between and by all and every the parties hereto, that all and every the sales, conveyances, and assurances, acts, deeds, matters, and things which shall be made done or executed by the said Charles Campbell, his heirs or assigns of and concerning the premises hereby authorized to be sold as aforesaid, or any of them shall be as valid and effectual in the law, though the said Francis Forester, his heirs or assigns, shall not execute or assent to the same, as the same would have been, if he or they had duly executed or assented to the same; and that the receipt or receipts in writing of the said Charles Campbell, his heirs or assigns, shall be a sufficient and effectual discharge or discharges to any purchaser or purchasers of all or any part of the same hereditaments and premises for his, her, or their purchase-money or monies, or so much thereof as shall be thereby acknowledged to

Sale to be

valid without
mortgagor's
concurrence.

And mort-
gee's receipts
to be dis-
charged.

be received. And that the same purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for the loss misapplication or non-application, or be in anywise obliged or concerned to see to the application of or to the necessity of raising the money in such receipt or receipts, acknowledged to be received, or any part thereof, nor to the fact of such non-payment as aforesaid, of the said mortgage debt, or the interest thereof or any part thereof respectively, nor to any other circumstance under which a sale is hereby authorized to be made. And it is hereby agreed and declared between and by the parties hereto, that the said Charles Campbell, his heirs, executors, administrators, and assigns, shall stand and be possessed of and interested in the monies to arise from such sale or sales of all or any of the messuage, lands, and other hereditaments hereby authorized to be sold as aforesaid, and the rents and profits thereof after having entered into the possession or receipt of such rents and profits, until the same premises shall be so sold upon and for the trusts intents and purposes following (that is to say), In trust in the first place to pay and satisfy or retain to himself or themselves thereout all costs and expenses attending such sale or sales or otherwise to be incurred in the execution of the trusts hereby declared. And in the second place to retain or pay and satisfy thereout to him the said Charles Campbell, his executors, administrators, or assigns, the aforesaid sum of one thousand pounds, and the interest and arrears of interest thereof, or so much or such parts of the said principal and interest monies, or any of them as shall be then due and unpaid, together with any costs and expenses attending the non-payment thereof respectively. And after all the aforesaid principal and interest monies, costs, and expenses shall be wholly paid and satis-

Trusts of

monies arising from sale.

1st. To pay expenses of sale.

2dly, To pay mortgage debt, and interest.

And
to pay sur-
plus to mort-
gagor.

And

To reconvey
any unsold
premises.

Proviso for
reduction of
interest on
regular pay-
ment of the
same.

fied, then in trust to pay over the residue or surplus of the said trust monies to arise by the means aforesaid, unto the said Francis Forester, his heirs, executors, administrators or assigns, for his and their own benefit. And in case any part of the messuage, lands, and other hereditaments herein comprised, shall remain unsold under the trusts aforesaid, then in trust after all the said principal and interest monies, costs and expenses shall be fully paid and satisfied to reconvey and assure such remaining part of the said messuage, lands, and other hereditaments unto the said Francis Forester, his heirs or assigns, or as he or they shall order and direct for his and their own benefit. Provided always and it is hereby agreed and declared between and by the parties hereto, and particularly by the said Charles Campbell, that if the said Francis Forester, his heirs, executors, administrators or assigns, do and shall on every 1st day of October and 1st day of April, whilst the said principal sum of one thousand pounds, or any part thereof shall continue upon this present security or within thirty days next after each of the said days respectively, well and truly pay or cause to be paid unto the said Charles Campbell, his executors, administrators or assigns, interest for the said sum of one thousand pounds at the rate of four pounds for one hundred pounds for a year, Then and in such case, and while the same shall be so paid, he the said Charles Campbell, his executors, administrators, and assigns shall and will accept and take interest for the said sum of one thousand pounds at the rate of four pounds for one hundred pounds for a year, for every such half year only for which such interest shall be paid to him or them within the said thirty days commencing as aforesaid, but not for any other half year, nor in consequence of having waived the receipt of full interest in any preceding half year in which any such default shall have occurred, or anything herein con-

Covenants
from Mort-
gagor for
payment of
the loan and
interest.

tained to the contrary notwithstanding. And the said Francis Forester doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said Charles Campbell, his executors, administrators and assigns, that he the said Francis Forester, his heirs, executors or administrators, shall and will well and truly pay or cause to be paid unto the said Charles Campbell, his executors, administrators or assigns, the aforesaid sum of one thousand pounds and interest, at the rate agreed upon in the parts or shares, and on or at the days or times hereinbefore for that purpose mentioned, without any deduction or abatement whatsoever, according to the condition of the said recited bond and the true intent of these presents. And the said Francis Forester doth for himself, his heirs, executors and administrators, grant, covenant, promise, and agree to and with the said Charles Campbell, his heirs and assigns, by these presents in manner following (that is to say) that he the said Francis Forester now is lawfully and rightfully seised of or well entitled to an absolute estate of inheritance in fee simple of and in the messuage, lands, and other hereditaments hereby released or intended so to be without any condition, use, trust, power, or other matter or thing whatsoever to alter, charge, incumber, lessen or determine the same. And that he the said Francis Forester hath in himself good right and full power to release and convey the said messuage, lands, and other hereditaments hereby released with their appurtenances unto and to the use of the said Charles Campbell, his heirs and assigns, But upon the trusts and subject to the provisos and in manner aforesaid according to the true intent of these presents. And also that if default shall be made in payment of the said sum of one thousand pounds and interest or any part thereof, contrary to the condition of the said recited bond, and to these presents, Then and in such case, but not otherwise,

Absolute co-
venants for
Title.

it shall and may be lawful to and for the said Charles Campbell, his heirs or assigns, at any time or times thereafter, into and upon all and every the messuage, lands, and other hereditaments hereby released or intended so to be or any part thereof, to enter and the same thenceforth peaceably and quietly to hold, occupy, possess and enjoy, and to receive and take the rents, issues and profits thereof, But upon and for the trusts, intents and purposes hereinbefore declared thereof, without any let, suit or interruption whatsoever of, from, or by the said Francis Forester, his heirs or assigns, or any person or persons whomsoever having or claiming or hereafter to have or claim any lawful or equitable estate, right, title or interest in, to, or out of the same messuage, lands and other hereditaments, or any of them, And that free and clear of, from and against all former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, entails, statutes, judgments, recognisances, executions, rents, sums of money, forfeitures, re-entries, and all other estates, titles, troubles, charges. and incumbrances whatsoever, And moreover that he the said Francis Forester, and his heirs and all and every other person and persons whosoever having or claiming or to claim any estate, right, title or interest of, in, or to the messuage, lands, and other hereditaments hereby released or intended so to be, or any part thereof, shall and will at all times hereafter, upon every request of the said Charles Campbell, his heirs, executors, administrators or assigns, but at the proper costs and charges of him the said Francis Forester, his heirs, executors or administrators, make, do and execute, and cause and procure to be made done and executed, all and every such further and other lawful and reasonable acts, deeds, matters, conveyances and assurances in the law whatsoever, for the further, better and more perfectly conveying and assuring the messuage, lands, and

other hereditaments hereby released or intended so to be with their appurtenances unto and to the use of the said Charles Campbell, his heirs and assigns, But upon the trusts and subject to the provisoes hereinbefore declared and contained thereof as by him or them or his or their counsel in the law shall be reasonably devised or advised and required. In witness, &c. [*To conclude as the preceding forms after the present mode.*]

APPENDIX,

A MARRIAGE SETTLEMENT OF REAL ESTATE, AFTER
THE PRESENT FORM.

THIS INDENTURE, made the first day of April, in the year of our Lord, 1826, Between Alfred Allen of Esq. (*intended husband*), of the first part, Clara Campbell, of spinster, (*intended wife*), of the second part, David Danvers and Edward Empson, both of Esqs. (*Trustees to preserve contingent remainders, &c.*) of the third part, Francis Forester of Esq., and George Gordon of Gentleman, (*Trustees for Wife's pin-money*) of the fourth part, and Humphrey Hobart and John Johnson, both of Gentlemen, (*Trustees of term for securing jointure, and raising portions for younger children*) of the fifth part, Whereas a marriage is intended to be shortly had and solemnized between the said Alfred Allen and Clara Campbell, And whereas the said A. Allen is seised or otherwise well entitled in fee-simple in possession of or to (among divers other hereditaments) the manor or lordship of Waring in the county of Lincoln and the messuages or tenements, lands, tithes, and other hereditaments, situate, lying, and being in the parish of Waring in the same county hereinafter described and intended to be hereby released, And upon the treaty for the said intended marriage it was agreed that the same manor, messuages, lands, tithes, and other hereditaments, should be settled and assured by the said A. Allen, To, upon, and for the uses, trusts, intents, and purposes, and with

Intended
marriage.

No. III.

A MARRIAGE SETTLEMENT OF REAL ESTATE, UNDER
THE PROPOSED CODE.

THIS DEED made the first day of April, 1826, Between Alfred Allen of of the one part; and Clara Campbell of of the other part, Witnesseth that in consideration of a marriage agreed upon and about to be solemnized between the said A. Allen, and C. Campbell, He the said A. Allen, doth convey, charge, and settle, in the event of such marriage taking effect, and from and after the same, all and singular the messuages, cottages, farms, and lands, situate in the parish of Waring in the county of Lincoln, comprised in the schedule to these presents, and therein particularly set forth by the names, quantities, qualities, situations, occupiers, and other circumstances necessary for the distinction thereof respectively, and all other, if any, the messuages and lands of or belonging to him the said A. Allen in the parish of Waring aforesaid, with the appurtenances thereto respectively belonging, and also all the impropriate tithes or tenths of corn, grain, and hay, and other great tithes or tenths whatsoever, and all moduses and other compositions for tithes or tenths yearly arising and payable from or in respect of all and singular the aforesaid lands and premises; To the person and persons respectively, With the several yearly and principal sums, and for the purposes following, viz., the said premises to stand and be charged with the clear yearly sum of two hundred pounds sterling to be paid to the said Clara Campbell, for her exclusive and inalienable enjoyment during the said intended intermarriage, and subject thereto, the premises to go to the said A. Allen, during his life, without impeachment of waste, and after his death, the

Witness.

and subject to the powers and provisos hereinafter declared and contained of and concerning the same. Now this Indenture witnesseth that in pursuance of the said agreement, and in consideration of the said intended marriage between the said Alfred Allen and Clara Campbell, and of the portion or fortune in money to which the said C. Campbell is entitled, He the said A. Allen Hath granted, bargained, sold, aliened, released, and confirmed, and by these presents Doth grant, bargain, sell, aliene, release, and confirm unto the said David Danvers and Edward Empson (in their actual possession, now being by virtue of a bargain and sale to them thereof made by the said A. Allen, in consideration of the sum of five shillings by Indenture bearing date the day next before the day of the date of these presents, for the term of one whole year commencing from the day next before the day of the date of the same Indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and their heirs, All that the manor or lordship or reputed manor or lordship of Waring in the said county of Lincoln, And also all and singular the messuages, cottages or tenements, farms, lands, woods, and other hereditaments, situate, lying, and being in the said parish of Waring, in the same county, comprised and set forth in the schedule to these presents, and therein particularly described by the names, quantities, qualities, situations, tenants, and other circumstances necessary for the distinction thereof respectively, And all other, if any, the messuages, lands, and hereditaments, of or belonging to him the said Alfred Allen, or any person or persons in trust for him in the parish of Waring aforesaid, And also all the impropriate tithes or tenths of corn, grain, and hay, and other great tithes or tenths whatsoever, and all moduses and other compositions for tithes, or tenths, yearly arising, growing,

said premises to stand charged with the clear yearly sum of five hundred pounds sterling, to be paid to the said Clara Campbell during her life in lieu of her legal interest in any lands to which the said A. Allen shall die entitled, and subject thereto, the said premises to stand and be charged with the sum of five thousand pounds as a provision for such child and children of the said intended marriage (except an eldest or only son, for the time being, entitled either absolutely or presumptively under the limitations next ensuing) and to vest and become payable at and in such time, or times and manner as hereinafter mentioned; and subject as aforesaid the said premises to go To such son of the said A. Allen, by the said C. Campbell as shall first or alone attain the age of twenty-one years, or dying under that age shall leave issue of his body living or conceived at his death, and if there shall be no such son, then to all and every the daughter or daughters of the said A. Allen by the said C. Campbell, who shall attain the age of twenty-one years, or dying under that age shall leave issue of her or their body or respective bodies, living at her or their death or respective deaths, in equal shares if more than one, and if there be but one such daughter, then the whole of the premises to that daughter, And if there shall be no child of the said intended marriage, who shall become absolutely entitled to the premises under the limitations aforesaid, then the same premises to go and revert to the said A. Allen, And as to the said sum of five thousand pounds hereinbefore charged for the benefit of such child or children of the said intended marriage (not being an eldest or only son for the time being intitled either absolutely or presumptively as aforesaid) as hereinafter mentioned, It is hereby declared that the same sum shall vest in and become payable to such child or children (except as aforesaid), or else in any one or more exclusively of the other or others of them at such age or time or respective ages or times, in such manner and with such dispositions over, to, or for the benefit of the other or others of the same children or any of them, as the said A. Allen shall at any time or times after the said intended marriage direct or appoint, And for want of

renewing, issuing, and payable from and out or in respect of all and singular the aforesaid lands and tenements, Together with all and singular houses, outhouses, edifices, buildings, yards, gardens, orchards, lands, meadows, pastures, heaths, moors, marshes, folds, feedings, parks, warrens, wastes, commons, common of pasture and turbarry, mines, minerals, quarries, mills, mulctures, tolls, duties, woods, underwoods, ditches, fences, ways, paths, waters, water courses, lakes, pools, fishings, fowlings, courts leet, courts baron, and customary and other courts, perquisites and profits of courts, view of frankpledge, services, royalties, jurisdictions, franchises, heriots, fines on death, alienation or otherwise, reliefs, amerciaments, goods and chattels of felons and fugitives, felons of themselves, and outlawed persons, deodands, waifs, estrays, chief rents, quit rents, liberties, profits, privileges, commodities and advantages whatsoever, to the manor, messuages or tenements, lands and other hereditaments hereby released or intended so to be, or any of them belonging or in any wise appertaining, or to or with the same or any part thereof now or heretofore demised, used, occupied or enjoyed. And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the aforesaid manor, messuages, or tenements, lands, and other hereditaments, And all the estate, right, title, interest, use, trust, property, benefit, claim, and demand whatsoever of the said A. Allen, into and upon the same hereditaments. To Have and To Hold the manor, messuages, lands, tithes, and all other the hereditaments hereby released or intended so to be and every part thereof unto the said D. Danvers and E. Empson, their heirs and assigns for ever, to, upon, and for the uses, trusts, intents and purposes following (that is to say), To the use of the said A. Allen and his heirs in the mean time,

Haſendum.

Uses, &c.
vis.
To settlor
till the marriage.

such direction or appointment, or so far as the same, if incomplete, may not extend, the said charge, or the unappointed part thereof, shall vest in and go to all and every the children and child of the said intended marriage (other than an eldest or only son for the time being entitled as aforesaid) who shall attain the age of twenty-one years, or in the instance of a daughter or daughters shall marry under it, to be equally divided between such children if more than one, and if there shall be but one such child, then the whole of the said unappointed charge to vest in and go to such one child, and the same charge to be paid to such children or child respectively, at the same ages or times, or age or time, if the same shall happen after the death of the said A. Allen, But if the same shall happen in his lifetime, then immediately after his death, provided always that after the death of the said A. Allen, and in case he shall have made no direction to the contrary, it shall be lawful for the guardian or guardians of any infant child or children of the said intended marriage presumptively entitled to a portion or portions under the said charge, to levy and raise any part or parts not exceeding in the whole, for any one such child, a moiety of such his, her, or their then eventual portion or portions although the same shall not then have become vested, and to apply the money so to be raised for the preferment, advancement, or benefit of such child or children in such manner as such guardian or guardians shall in their or his discretion think fit, provided also that after the death of the said A. Allen, and in case he shall have made no direction to the contrary it shall be lawful for any such guardian or guardians as aforesaid, to levy and raise and apply for the maintenance and education of such child or children for the time being of the said intended marriage, as shall be presumptively entitled to a portion or portions under the said charge, in the mean time and until such his, her, or their eventual portion or portions shall become vested, such yearly sum or sums of money not exceeding what the interest of the same portion or portions would amount to at the rate of four pounds per cent. per annum were he, she, or they then absolutely entitled thereto.

To trustees
for 99 years
upon trusts
after men-
tioned.

To intended
husband for
life.

To trustees
to preserve
contingent
remainders.

Rent-charge
for wife's
jointure.

and until the said intended marriage between the said A. Allen and C. Campbell shall take effect. And immediately from and after the solemnization of the said intended marriage, To the use of the said Francis Forester and George Gordon, [*trustees for wife's pin-money,*] their executors, administrators and assigns, for and during and unto the full end and term of ninety-nine years, from thenceforth next ensuing, and fully to be complete and ended without impeachment of or for any manner of waste, upon and for the trusts, intents and purposes, and with and subject to the powers and proviso hereinafter declared thereof. And from and after the expiration or sooner determination of the said term of ninety-nine years, and in the meantime subject thereto and to the trusts thereof, to the use of the said A. Allen and his assigns, during his natural life, without impeachment of or for any manner of waste, and immediately from and after the determination of that estate by forfeiture or otherwise, in the lifetime of the said A. Allen, to the use of the said D. Danvers and Edward Empson, [*trustees to preserve contingent remainders*] their heirs and assigns, during the natural life of the said Alfred Allen Upon trust by all usual or necessary means, to support the contingent uses and estates hereinafter limited from being defeated or destroyed, but to permit the said Alfred Allen and his assigns to receive and take the rents and profits of the said premises during his life, for his and their own benefit, and immediately from and after the decease of the said A. Allen, To the use, intent and purpose, that the said Clara Campbell, in case she shall survive the said A. Allen and her assigns, shall and may, from and immediately after his decease, yearly receive and take during the term of her natural life, for her jointure, and in lieu, bar and satisfaction of all dower thirds and freebench at common law by custom or other-

ON PROPOSED FORM OF SETTLEMENT.

OF the three preceding descriptions of legal instruments, settlements are essentially the most complicated in their character; and hence the proposed form of one presents the greatest deviation from our present mode. Passing over the alterations in the manner of conveying and charging, as having been already exemplified in purchase and mortgage-deeds, I shall briefly enumerate those which are peculiar to this assurance, and shall advert to the legal provisions of the suggested code, which will form substitutes for the numerous clauses that swell our actual form: first observing, that the description of the manor is omitted, under the supposition that all tenures are abolished.

1. The insertion of trustees, with a term of years, for securing the wife's pin-money, is rendered needless by Art. 24—54. The omission of any fixed period for payment of it is supplied by Art. 55.

2. The abolition of tenures, and the operation of Art. 36, render needless any limitations after the father's life-estate, to preserve the contingent remainders to the issue of the marriage.

3. The present limitations of powers of distress and entry, for enforcing the widow's jointure; the term of years to her trustee for levying any arrears, and the specifications of the periods for its payment, find more than their equivalents in Art. 54, 55, 56.

4. The rents which, during the minority of an eldest son, presumptively entitled under the preceding limitations, are, according to our present system, undisposed of, will, under Art. 54, belong to such eldest son, and may be received in his behalf by his guardian.

5. Should it be deemed advisable to preserve to a parent the influence which, under our ordinary settlements in tail, he at present possesses over an expectant eldest son, requiring his

wise, which she might otherwise have claim or demand in, to, or out of all or any lands or hereditaments of which the said A. Allen now is or shall, during the said intended coverture, be seised for any estate of inheritance or customary estate, One annual sum or yearly rent charge of five hundred pounds of lawful British money, to be charged upon and yearly issuing, and payable out of all and singular the said manor, messuages, lands and other hereditaments hereby released or intended so to be, and to be paid by equal half-yearly payments on the 25th day of March and the 29th day of September in every year, without any deduction or abatement whatsoever for taxes or otherwise, the first payment thereof to be made on such of the said half-yearly days of payment as shall happen next after the decease of the said A. Allen. And to and for this further use, intent and purpose, that in case and when, and so often as the said annual sum or yearly rent-charge of five hundred pounds or any part thereof shall at any time or times be unpaid for the space of twenty-one days or more, next after either of the said days appointed for the payment thereof as aforesaid, Then and so often it shall and may be lawful to and for the said Clara Campbell, and her assigns, to enter into and distrain upon the manor, messuages, lands and other hereditaments hereby charged therewith, or any part thereof, and to dispose of the distress and distresses then and there found according to law, To the intent that thereby or otherwise the said annual sum or yearly rent-charge of five hundred pounds, or any part thereof, so in arrear and unpaid, and all costs, charges and expenses occasioned by reason of the non-payment thereof, shall be fully paid and satisfied. And to and for the further use, intent and purpose, that in case the said annual sum or yearly rent-charge of five hundred pounds, or any part

Powers of
distress and
entry.

concurrence in a recovery, this may be tacitly effected by adopting the suggestion in the comment on Art. 42, 43, 44, (p. 345.)

6. The present machinery for raising the younger children's portions, of a long technical term, and trustees with special powers, which ordinarily do not come into action till the donees are no longer in existence to use them, are superseded by a direct charge. This will vest in the children themselves, when they become entitled to their portions; together with the legal powers for raising it, given by Art. 60, on which see the final sentence of the comment.

Art. 68 renders it needless to specify, in the power of appointment given to the parent, the instrument or formalities by which it may be executed; and this may be taken as a general example of powers in their corrected state. Art. 72 supersedes the clause at present in use, that a partial appointment to a younger child shall, in the absence of any contrary declaration, go in part of his portion.

The provisions for advancement and maintenance during minority being, in their nature, discretionary, and not absolute, and requiring to be enforced while the children themselves will be incompetent to do it, the necessary powers cannot be anywhere so well reposed as in their guardians; who will, of course, possess the different *legal* remedies for that purpose under ch. 4 of Tit. III.

7. The several powers of selling, exchanging, making partition, and leasing, are all provided for by Art. 44, 45 under the title of '*Legal Incidents*.'

8. The present covenants for the title are supplied by Art. 74.

9. The present clauses for changing and indemnifying trustees, are rendered needless, by dispensing with the trustees themselves. Any expense which a *guardian* may incur, in levying rents, interest, or capital, would either be reimbursed to him, like any other owner or incumbrancer, out of the property charged; or else be allowed in passing the accounts of his ward.

thereof, shall at any time or times be unpaid by the space of forty days or more, next after either of the said days appointed for the payment thereof Then and so often, although there shall not have been any legal demand made thereof, it shall and may be lawful to and for the said Clara Campbell and her assigns, at any time or times during the continuance of the said annual sum or yearly rent charge, or in case there shall be any arrears thereof due for the space of seven days or more, next after her death, then, to and for her executors, administrators or assigns, at any time after, to enter into and upon, and hold the manor, messuages, lands, and other hereditaments hereby charged with the same annual sum or yearly rent-charge as aforesaid, or any part thereof, and to receive and take the rents, issues and profits thereof, to and for her and their own use, until she and they shall therewith and thereby or otherwise be fully paid and satisfied, the said annual sum or yearly rent-charge of five hundred pounds, and the arrears thereof due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises or any part thereof, together with all costs, charges and expenses which she or they shall sustain by reason of the non-payment thereof, and such possession when taken to be without impeachment of waste. And as to the messuages, lands and other hereditaments herein comprised, subject to the said annual sum or yearly rentcharge of five hundred pounds, hereby limited, and the powers and remedies for securing the same to the use of the said Humphrey Hobart and John Johnson, their executors, administrators and assigns, for and during and unto the full end and term of five hundred years from thenceforth next ensuing, and fully to be complete and ended without impeachment of or for any manner of waste, Upon and for the trusts, intents and purposes, and with and

To trustees
or 500 years

upon trusts
after-men-
tioned

subject to the powers and provisos hereinafter declared thereof, And from and after the expiration, or sooner determination of the said term of five hundred years, and in the mean time subject thereto and to the trusts thereof,

Remainder To the use of the first son of the body of the said A. Allen, by the said C. Campbell his intended wife, lawfully to be begotten, and the heirs of the body of such first son issuing, and for want of such issue, to the use of the second and every other son of the body of the said A. Allen, by the said C. Campbell his intended wife, lawfully to be begotten, severally, successively, and in remainder one after another, in order and course, as such sons shall respectively be in priority of birth, and the heirs of the body and respective bodies of such son and sons issuing, every elder of such sons, and the heirs of his and their body and respective bodies issuing being always to take before and be preferred to every younger of such sons, and the heirs of his and their body and respective bodies issuing, And for want of such issue,

To first and other sons in tail. To the use of all and every the daughter and daughters of the said A. Allen, by the said Clara Campbell his intended wife to be begotten, equally to be divided between them if more than one, as tenants in common, and the heirs of their respective bodies issuing, and in case there shall be a want of issue of the body or respective bodies of any such daughter or daughters, then as to the part or parts, share or shares, as well original as by survivorship or accruer of such of them whose issue shall so fail, To the use of the others or other of such daughters, equally to be divided between them if more than one, as tenants in common, and the heirs of their respective bodies issuing. And in case there shall be a want of issue of the bodies of all such daughters save one, or if there shall be but one such daughter, then to the use of such remaining or only daughter and the heirs of her

Remainder. To daughters as tenants in common in tail with cross remainders in tail.

Ultimate remainder to

Intended
husband is
fee.

Trusts of the

99 years
term to raise
200l. per-
annum for
the intended
wife's pin
money.

body issuing, And for want of such issue, to the only use and behoof of the said A. Allen, his heirs and assigns for ever, and to or for no other use, intent or purpose whatsoever. And it is hereby agreed and declared between and by the parties to these presents, that the manor, messuages, lands, tithes and other hereditaments hereby limited to the said Francis Forester and George Gordon [trustees for wife's pin money], their executors, administrators and assigns for the said term of ninety-nine years, are so limited to them upon trust that they, the said Francis Forester and George Gordon, or the survivor of them, their, or his executors, administrators or assigns, do and shall during so many years of the said term of ninety-nine years, as the said Alfred Allen and Clara Campbell shall jointly live by and out of the rents, issues and profits of the manor, messuages, lands, tithes and other hereditaments comprised in the same term, or by demising, mortgaging or selling the same or any part thereof, or by all or any of the same ways or means or any other reasonable ways or means, levy and raise the clear yearly sum of two hundred pounds of lawful British money by two equal half yearly payments on the 1st day of October and the 1st day of April in every year, the first payment thereof to be so raised on such of the said half yearly days of payment as shall next happen after the solemnization of the said intended marriage, and do and shall pay the said yearly sum of two hundred pounds, when and as the same shall from time to time become due and be received unto such person or persons and for such intents and purposes as the said Clara Campbell by any writing or writings to be signed with her own hand shall, notwithstanding her said intended coverture, from time to time, when and as the same shall become due, but not by way of assignment, charge, or other anticipation thereof, direct or appoint, and until and in default of such direc-

PRESENT FORM OF SETTLEMENT.

tion or appointment into her own proper hands for her own sole and separate benefit independent of and free from the debts, controul or interference of her said intended husband, For which purpose it is hereby declared that the receipts in writing of the said Clara Campbell or of such her appointee or appointees as aforesaid shall, notwithstanding her said intended coverture, be good and effectual discharges for the same yearly sum or any part thereof respectively, And do and shall from time to time, after full payment and satisfaction of the said yearly sum of two hundred pounds and all arrears thereof, and all costs, charges and expenses attending the execution of the trusts of the said term of ninety-nine years and in relation thereto, pay the surplus of the money to be raised by the ways and means aforesaid to and permit and suffer the overplus and residue of the rents, issues and profits of the said manor, messuages, lands and other hereditaments to be had and received by the said Alfred Allen and his assigns for his life, ~~and their own benefit,~~ *Provided always that immediately after the said yearly sum of two hundred pounds shall cease and be no longer payable, and all arrears thereof if any and all other charges and expenses relating thereto, shall be fully paid and satisfied, the said term of ninety-nine years shall from thenceforth cease and be void.* And it is hereby further agreed and declared between and by the parties to these presents, that the said manor, messuages, lands and other hereditaments hereby limited to the said Humphrey Hobart and John Johnson for the said term of five hundred years are so limited to them upon and for the trusts, intents and purposes following, (that is to say) upon trust in the first place, that in case the said annual sum or yearly rent-charge of five hundred pounds hereby limited to the said Clara Campbell from and after the decease of the said Alfred Allen, if she shall survive him as aforesaid, or any

*Proviso for
cessor of the
term of
ninety-nine
years.*

*Trusts of the
term of 500
years.*

*1st. To se-
cure the
rent-charge.*

survivor of them at and by their, his, or her request or direction in writing, but subject and without prejudice to the said annual sum of two hundred pounds payable to the said Clara Campbell during the joint lives of herself and the said Alfred Allen as aforesaid, and the said term of ninety-nine years and the trusts thereof, and also to the said annual sum or yearly rentcharge of five hundred pounds, and the powers and remedies for enforcing payment thereof by and out of the rents, issues and profits of the said manor, messuages, lands, tithes and other hereditaments comprised in the said term of five hundred years, or by demising, mortgaging or selling the same or any part thereof for all or any part of the same term, or by all or any of the said ways or means or any other reasonable ways or means, levy and raise the sum of five thousand pounds of lawful British money for the portion or portions of any such child or children other than and besides an eldest or only son, so for the time being entitled as aforesaid, to such sum of five thousand pounds to vest and be paid and payable to, between, or among such child or children respectively other than and besides an eldest or only son for the time being, entitled as aforesaid in manner hereinafter mentioned (that is to say) The same to become and be vested in such children if more than one, other than and besides an eldest or only son entitled as aforesaid, or else in any one or more exclusively of the other or others of them, and to be paid to him, her, or them respectively at such age or respective ages or times and in such manner and with such dispositions over to or for the benefit of the others of the same children or any of them as the said Alfred Allen shall at any time or times after the said intended marriage by any deed or deeds, writing or writings with or without power of revocation and new appointment to be sealed and delivered by him in the presence of two or more witnesses, or by

As the husband shall by deed or will appoint.

In default
To the
younger
children
equally.

his last will and testament in writing or any codicil thereto to be by him signed and published in the presence of and attested by three or more witnesses, direct or appoint, And for want of any such direction or appointment as aforesaid or so far as the same if incomplete shall not extend, Then to, between, or among such child or children (except as aforesaid) in manner following (that is to say) if there shall be but one such child (other than and besides an eldest or only son for the time being entitled as aforesaid) the said sum of five thousand pounds to vest in such only child being a younger son at his age of twenty-one years, or being a daughter at her age of twenty-one years or on the day of her marriage, and to be paid to him or her on or at the same age, day, or time if the same shall happen after the decease of the said Alfred Allen, but if the same shall happen in his lifetime then immediately after his decease, unless he shall direct the same to be raised and paid in his lifetime as aforesaid, and if there shall be two or more such children other than and besides an eldest or only son, for the time being, entitled as aforesaid, then the said sum of five thousand pounds to vest in and be paid to, between, or among such two or more children, in equal shares and proportions; the share or shares of such of them as shall be a younger son or sons to vest in him or them respectively, at his or their age, or respective ages of twenty-one years; and the share or shares of such of them as shall be a daughter or daughters to vest in her or them respectively, at her or their age, or respective ages of twenty-one years, or on the day or respective days of her or their marriage, or respective marriages which shall first happen, and to be paid to them respectively on or at the same ages, days, or times respectively, if the same respectively shall happen after the decease of the said Alfred Allen, but if the

No child, in favour of whom the parent shall exercise his power of appointment, to take any share in the unappointed residue, until the other children have received portions equal to that appointed.

Benefit of survivorship between the children.

same shall happen in his lifetime, then immediately after his decease, unless he shall direct the same to be sooner raised and paid as aforesaid. Provided always, and it is hereby agreed and declared between and by the parties to these presents, that no child or children, taking any part of the said sum of five thousand pounds, under or by virtue of any direction or appointment to be made by the said Alfred Allen, in pursuance of the power hereinbefore given for that purpose, shall have or be entitled to any further or other share of or in that part of the said sum of five thousand pounds, of which no such appointment shall be made, until the other child, or each and every of the other children of the said Alfred Allen by the said Clara Campbell, other than and besides an eldest or only son, for the time being entitled as aforesaid, shall have become entitled to a share or shares therein, equal in value to the share or shares so to be directed or appointed as aforesaid. Provided always, and it is hereby further agreed and declared, that if there shall be more than one child for whom portions are intended to be hereby provided, and any one or more of them shall die, or, being a younger son, or younger sons, shall become an eldest or only son, entitled as aforesaid, before he, she, or they shall acquire a vested interest or interests in the said sum of five thousand pounds, or any part thereof, under or by virtue of the powers hereinbefore contained, respecting the same or any of them, then as well the original share intended to be hereby provided for, as also the share or shares by virtue of this present clause, surviving or accruing to each and every such child so dying, or such son becoming an eldest or only son, entitled as aforesaid of or in the said sum of five thousand pounds, or so much thereof as shall not have been applied for his or her preferment in the world, in pursuance of the powers hereinafter for that purpose contained, shall vest in,

Advance-
ment clause
for the
children.

accrue, and belong to the survivor or survivors, or other or others of such children, other than and besides an eldest or only son, for the time being, entitled as aforesaid, in equal shares and proportions, if more than one, at and in such and the same time or times and manner as are hereinbefore declared and contained of and concerning his, her, or their original share or shares of and in the said sum of five thousand pounds. Provided also, and it is hereby agreed and declared, that it shall and may be lawful to and for the said Humphrey Hobart and John Johnson, and the survivor of them, his executors, administrators, and assigns, at any time or times after the decease of him the said Alfred Allen, or in his lifetime by such his direction or appointment as aforesaid, but subject, as hereinbefore mentioned, by all or any of the ways and means aforesaid, to levy and raise any part or parts of the portion or portions intended to be hereby provided for such child or children as aforesaid, not exceeding in the whole, for any one such child, one moiety or equal half part of his, her, or their eventual portion or portions of or in the said sum of five thousand pounds, although the same shall not have become vested or payable; and to apply the money so to be raised for the preferment or advancement of such child or children, in such manner as the said Humphrey Hobart and John Johnson, or the survivor of them, his executors, administrators, or assigns shall, in their or his discretion, or by such direction or appointment as aforesaid, as the case may be, think fit. And upon this further trust, that the said Humphrey Hobart and John Johnson, their executors, administrators, and assigns, do and shall, from and after the decease of the said Alfred Allen, but subject, and without prejudice as aforesaid, by and out of the rents, issues, and profits of the said manor, messuages, lands,

Maintenance
clause for the
children
during
minority,
&c.

tithes, and other premises, comprised in the said term of five hundred years, or any part thereof, levy, raise, and apply, for the maintenance and education of such child or children, for the time being, of the said A. Allen by the said Clara Campbell, as shall be presumptively entitled to a portion or portions, under the trusts or powers aforesaid, in the mean time and until his, her, or their eventual portion or portions of the said sum of five thousand pounds, shall become vested and payable, such yearly sum or sums of money, not exceeding what the interest of the same portion or portions would amount to at the rate of five pounds per cent. per annum, were he, she, or they entitled thereto, as the said Humphrey Hobart and John Johnson, or the survivor of them, his executors, administrators, or assigns, shall think fit. Provided always, and it is hereby further agreed and declared, that the said Humphrey Hobart and John Johnson, or the survivor of them, their or his executors, administrators, or assigns, shall not sell or mortgage any part or parts of the manor, messuages, lands, and other hereditaments, comprised in the said term of five hundred years, unless and until some part or portion, or parts or portions of the said sum of five thousand pounds, raiseable under the trusts of the same term, for portions as aforesaid, shall become vested and payable under such trusts, or shall become raiseable for the advancement in life of any child or children for whom a portion or portions is or are intended to be hereby provided, under the aforesaid power for that purpose, and then only for raising such part or parts thereof as shall be so vested and payable, or raiseable as aforesaid. And it is hereby further agreed and declared, that the rents, issues, and profits of the same manor, messuages, lands, and other hereditaments, comprised in the said term of five hundred years, subject as aforesaid; or so much of such rents,

Trustees not to sell or mortgage until the portions shall become payable, or for advancement.

The rents

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Proviso for
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hundred
years.

Power of
leasing to
intended
husband
during his
life, and to
trustees
during the
minority of
the children.

issues, and profits, as shall remain after answering all and every the purposes aforesaid, shall, until it shall be necessary to resort thereto for the purposes hereinbefore declared of the said term of five hundred years, be had and received by the person or persons who, for the time being, shall be entitled to the same manor, messuages, lands, tithes, and other hereditaments in remainder or reversion, immediately expectant on the determination of the same term, under the limitations hereinbefore contained, for his and their own use and benefit.— Provided always and it is hereby agreed and declared between and by the parties hereto, that from and immediately after the trusts hereinbefore declared, of and concerning the said term of five hundred years, shall in all respects be fully performed, or otherwise satisfied or discharged, or shall become unnecessary, or incapable of taking effect, and the said Humphrey Hobart and John Johnson, and their executors, administrators, and assigns, and every of them respectively shall be fully reimbursed and satisfied, all costs, charges, and expenses to be occasioned by or relating to the trusts hereby in them reposed, the said term of five hundred years shall as to such of the manor, messuages, lands, and other premises comprised therein, as shall not have been sold or mortgaged for the purposes aforesaid, absolutely cease and determine, And as to such of the same premises as shall have been so mortgaged shall (subject to such mortgage) wait upon and attend the reversion and inheritance of the premises so mortgaged. Provided always and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said Alfred Allen, at any time or times after the said intended marriage during his life, and after his death to and for the said David Danvers and Edward Empson [trustees

to preserve contingent remainders,] and the survivor of them, their, and his heirs and assigns, from time to time, and at all times during the minority of any child or children of the said Alfred Allen, by the said Clara Campbell, his intended wife, who by virtue of any of the limitations aforesaid, shall be entitled to any estate of inheritance in possession of or in the said messuages, lands, tithes, and other hereditaments herein comprised by any indenture or indentures to demise or lease all or any part or parts of the said manor, messuages, lands, tithes, and other hereditaments, (except the manor,) to any person or persons for any term or terms not exceeding twenty-one years, to take effect in possession, and not in reversion, and so as there be reserved on every such demise or lease the best or most improved yearly rent or rents to be incident to the immediate reversion of the hereditaments so to be demised, that can be reasonably gotten for the same, without taking any fine, premium, or foregift, for the making thereof, and so as there be contained therein a condition for re-entry or non-payment of the rent or rents, thereby to be respectively reserved for the space of thirty days or more, and so as the lessee or lessees do execute a counterpart thereof respectively, and do thereby covenant for the due payment of the rent or rents, thereby to be respectively reserved, and to keep and leave the demised buildings in repair, and to cultivate the demised lands in a proper and husbandlike manner, and be not thereby exempted from punishment for committing waste. Provided also, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said David Danvers and Edward Empson, [trustees to preserve, &c.] and the survivor of them, their and his heirs and assigns, at any time or times after the said intended marriage

Power of
sale and ex-
change for
trustees.

during the life of the said A. Allen, at and by his request and direction in writing, to dispose of either by way of absolute sale, or in exchange for or in lieu of other manors, messuages, lands, or hereditaments, to be situate somewhere in England or Wales, all or any part of the manor, messuages, lands, tithes, and other hereditaments hereby released or intended so to be, and the inheritance thereof in fee-simple to any person or persons whomsoever, for such price or prices in money, or for such equivalent or recompense in other manors, messuages, lands, or hereditaments, as to them the said David Danvers and Edward Empson, or the survivor of them, their, or his heirs or assigns, shall seem reasonable, and that for the purpose of effecting any such sale or exchange as aforesaid, it shall and may be lawful to and for the said David Danvers and Edward Empson, and the survivor of them, their, and his heirs and assigns, at such request and by such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, sealed and delivered by them or him in the presence of two or more witnesses, absolutely to revoke the subsisting uses of the hereditaments which shall be so proposed to be sold or exchanged, (but subject and without prejudice to any lease or leases which shall have been made in pursuance of the power of leasing hereinbefore contained) and to declare such new or other use or uses, or trusts and purposes, of the same hereditaments as the person or persons purchasing or taking in exchange the same, shall order and direct. And also that upon any such exchange as aforesaid, it shall and may be lawful to and for the said David Danvers and Edward Empson, and the survivor of them, their, and his heirs and assigns, to give or take any money by way of equality of exchange, and to raise and charge any money to be so given for that purpose, with interest upon the heredi-

taments to be taken in exchange. And also that upon payment of the money to arise by sale of the said hereditaments or any part thereof, or of any money to be paid for equality of exchange, or any part thereof, it shall and may be lawful to and for the said David Danvers and Edward Empson, and the survivor of them, their, or his heirs or assigns, to sign and give a receipt or receipts in writing for the money for which the same shall be so sold, or so to be paid for equality of exchange as aforesaid, and that such receipts shall sufficiently acquit and discharge the person or persons paying the same respectively therefrom, and from any loss, misapplication, or nonapplication thereof. And it is hereby also agreed and declared, that when all or any part or parcel of the manor, messuages, lands, tithes, and other hereditaments, hereby released, or intended so to be, shall be so sold for a valuable consideration in money, or any money shall be received for equality of exchange under the powers hereinbefore contained, they the said David Danvers and Edward Empson, or the survivor of them, their, or his heirs or assigns, shall with all convenient speed lay out and invest the money to arise by such sale or sales, or to be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, or hereditaments in fee-simple in possession, to be situate somewhere in England or Wales, of a clear and indefeasible estate of inheritance, or of any copyhold or leasehold lands or tenements convenient, to be held therewith, or with the hereditaments hereby released, or some part thereof, but not exceeding one equal eighth part in value of the whole estates to be so purchased, yet so as that during the life of the said Alfred Allen, every such purchase be made with his consent in writing. And moreover that any messuages, lands, or other hereditaments, so to be purchased, or to

Estate purchased to be settled to the same uses, and

be taken in exchange as aforesaid, shall be settled and assured to, upon, and for such and the same uses, trusts, intents, and purposes, and with and subject to such and the same powers and provisos as are by and in these presents limited and contained of and concerning the manor, messuages, lands, tithes, and hereditaments, hereby released, or intended so to be, or as near thereto as the death of parties and other intervening circumstances will then admit; yet so as that no copyhold or leasehold property to be purchased and settled as aforesaid, shall vest absolutely, or for the purpose of transmission, but only defeasibly in any person or persons entitled to an estate of inheritance in the freehold hereditaments herein comprised unless and until he, she, or they shall attain the age of twenty-one years or dying under that age shall leave lawful issue of his, her, or their body or respective bodies, living at his, her, or their decease or respective deceases, or (as to the issue of any son or sons) born in due time afterwards, And further, that until the money arising by such sale or sales, exchange or exchanges as aforesaid, shall be invested in real estates as aforesaid, the said David Danvers and Edward Empson, and the survivor of them, their, and his heirs, executors, administrators, or assigns shall, with the consent in writing of the said A. Allen, if then living, but if he shall be then dead, at the discretion of the trustees or trustee for the time being, place out such sum or sums of money at interest either in some of the parliamentary stocks or public funds of Great Britain, or upon real securities in England, in the name or names of such trustee or trustees for the time being, with power for the trustees for the time being to alter, vary, transfer and dispose of the said stocks, funds, and securities as occasion shall require, and also to give complete acquittances and discharges in writing to any person or

In the mean time the monies to arise from sale to be invested and

persons paying in, discharging, or purchasing any of the aforesaid trust, monies, stocks, funds, or securities, and that the interest, dividends, and annual produce arising from such investment, stocks, funds, or securities shall go and be paid to such person or persons, and applied for such intents and purposes, and in such manner as the rents, issues, and profits of the real estate to be purchased therewith would go or be payable or be applicable unto, in case such purchase or purchases and settlements as aforesaid were then actually made, and the said Alfred Allen for himself, his heirs, executors, and administrators, doth grant, covenant, promise, and agree to and with the said David Danvers and Edward Empson, [trustees to preserve, &c.] their heirs and assigns by these presents in manner following, (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said A. Allen or any of his ancestors, or any person or persons lawfully claiming from, under, or in trust for him, them, or any of them, made, done, committed, executed, or suffered to the contrary, he the said A. Allen now is lawfully, rightfully, and absolutely seised of or well entitled to the manor, messuages, lands, and other hereditaments hereby released or intended so to be and every part thereof, for an absolute and indefeasible estate of inheritance in fee simple, without any condition, use, trust, power of revocation, or other restraint, cause, matter, or thing whatsoever to alter, defeat, incumber, revoke, or make void the same; and that for and notwithstanding any such act, deed, matter, or thing as aforesaid, he the said A. Allen now hath in himself good right, full power, and lawful and absolute authority to grant, release, and convey the manor, messuages, lands, and other hereditaments hereby released or intended so to be, with their appurtenances, to and upon the uses and

The interest
to go as the
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Covenants
for title from
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That he is
lawfully
seised.

Has power
to convey.

trusts, and with and subject to the powers and provisoes hereinbefore declared and contained of and concerning the same according to the true intent of these presents, And that all and singular the said manor, messuages, lands, and other hereditaments shall and may for ever hereafter go and remain to, upon, with, and subject to the same user, trusts, powers, and provisoes, and shall and may be peaceably had, held, and enjoyed, and the rents, issues, and profits thereof and every part thereof, had, received, and taken accordingly, without any lawful let, suit, trouble, eviction, claim or demand, whatsoever of or by the said A. Allen, or any person or persons lawfully claiming from, under, or in trust for him, either him the said A. Allen or any of his ancestors, and that free and clear of, from, and against all former and other gifts, grants, bargains, sales, jointures, dowers, uses, trusts, entails, wills, statutes, judgments, executions, rents, sums of money, forfeitures, re-entries, and all other estates, titles, charges, troubles, and incumbrances whatsoever had, made, executed, or suffered by the said A. Allen or any of his ancestors, or any person or persons lawfully claiming or to claim from, under, or in trust for him or them; And further, that he the said A. Allen and his heirs and all and every person and persons whosoever, having or claiming, or who shall or may have or claim any estate, right, title, or interest at law or in equity, in, to, or out of the manor, messuages, lands, and other hereditaments hereby released or intended so to be, or any part thereof, from under or in trust for him the said Alfred Allen or any of his ancestors, shall and will from time to time and at all times hereafter upon every reasonable request and at the proper costs and charges of the said David Danvers and Edward Empson, their heirs or assigns or any person or persons for the time being, intituled under any of the limitations hereinbefore contained, make, do, and execute,

That the settled estates shall go to the uses declared thereof and

For further assurance.

Clause for
appointment
of new
trustees.

or cause and procure to be made, done, and executed, all and singular such further and other lawful and reasonable acts, deeds, things, conveyances and assurances in the law whatsoever for the further, better, and more absolutely granting, conveying and assuring the manor, messuages, lands, and other hereditaments hereby released or intended so to be, and every part thereof with their appurtenances, to and upon the uses and trusts, and with and subject to the powers and provisoes hereinbefore declared and contained as by the said David Danvers and Edward Empson, their heirs or assigns or any person or persons so for the time being entitled as aforesaid, or their or any of their counsel in the law shall be reasonably devised or advised and required. Provided always and it is hereby agreed and declared between and by the parties hereto, that if the trustees hereby appointed or any of them or any future trustee or trustees to be appointed in the stead or place of them or any of them, or of any succeeding trustee or trustees as hereinafter is mentioned, shall die or go to reside beyond the seas, or shall be desirous of being discharged from or decline or become incapable to act in the trusts hereby in them respectively reposed or authorized to be reposed before the said trusts shall be fully executed or at an end, then and in such case and so often as the same shall happen, it shall and may be lawful for the said Alfred Allen and Clara Campbell or the survivor of them, during their, his, or her lives and life. And after the decease of the survivor of them for the guardian or guardians of any infant child or children of the said intended marriage, who shall be interested in the said manor, messuages, lands, and other hereditaments herein comprised or any part thereof under the uses trusts and powers hereinbefore contained or any of them; but if there be no such guardian then for the surviving or continuing trustee or the executors or admi-

nistrators of the surviving trustee respectively by any writing or writings under their, his, or her hands and seals or hand and seal from time to time to substitute or appoint any person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, going to reside beyond the seas, desiring to be discharged, declining or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be appointed as aforesaid, all and singular the uses trusts and powers hereinbefore declared of and concerning the said manor, messuages, lands, and other hereditaments hereby released or intended so to be, and also of and concerning any hereditaments to be acquired under the aforesaid power of sale or exchange, or such of the said uses, trusts, and purposes as shall be then subsisting, or capable of taking effect, shall from thenceforth cease, determine, and be utterly void as far as respects any trustee or trustees in whose place any such trustee or trustees shall be appointed, and his or their heirs, and all the same hereditaments shall go and remain to the uses upon and for the trusts, intents and purposes, and with and subject to the powers and provisoes to, upon, for, with and subject to which the same or any of them would at the time every or any such appointment, under and by virtue of these presents, or any conveyance or assurance to and for the uses and purposes aforesaid, thereof stand and be limited, settled, subject, and liable respectively, in case the name or names of the new trustee or trustees so to be appointed from time to time, had been inserted in these presents, or any such conveyance or assurance as aforesaid, instead of the name or names of the trustee or trustees in whose stead or place such trustee or trustees shall be appointed, or instead of the name or names of any preceding trustee or trustees, and also upon every such appointment of a new trustee or

trustees, all the trusts, estates, monies, and premises, which at the time of such trustee or trustees so dying, going to reside beyond the seas, desiring to be discharged, declining, or becoming incapable to act as aforesaid, shall be legally vested in him or them, either solely or jointly, with the other trustee or trustees, (not being hereditaments as to which the old uses shall partially cease, and new uses arise as aforesaid,) shall be thenceforth with all convenient speed conveyed, assigned, and transferred respectively, in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee, and such new or other trustees; or if there shall be no continuing trustee, then in such new trustees only, upon and with the same trusts and powers as are hereinbefore declared and contained of and concerning the same trust estates, monies, and premises, or such of them as shall or may be then subsisting or capable of taking effect. And that every such new trustee shall and may in all things act and assist in the management and execution of the trusts to which he shall be appointed as fully and effectually, and with all the same powers and authorities to all constructions and purposes whatsoever, as if he had been originally nominated a trustee by and for the purposes of these presents. Provided always and it is hereby agreed and declared that the trustees for the time being, for the purposes aforesaid, and every of them and their respective heirs executors and administrators shall be severally charged and chargeable only for such monies as they shall actually receive by virtue of the trusts aforesaid, although they or any of them may give sign or join in any receipt or receipts for the sake of conformity, and that none of them shall be answerable or accountable for the other or others of them, nor for any banker broker or other agent

or person with whom any part of the said trust monies shall or may be deposited or lodged in the execution of the aforesaid trusts, nor for the insufficiency or deficiency of any security or securities stocks or funds, in or upon which the said trust monies or any part thereof may be placed out or invested, nor for any defect of title in any hereditaments to be purchased or taken in exchange, or in mortgage as aforesaid, nor for any other misfortune or loss in the execution of the aforesaid trusts, or any of them, except the same shall happen by or through their own wilful default respectively, and that it shall and may be lawful to and for the trustees for the time being and every of them by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse themselves, and also to allow to his and their co-trustee or co-trustees, all costs damages and expenses which they or any of them shall or may suffer, disburse, or incur in or about the execution of the aforesaid trusts, or any of them, or in relation thereto. In witness, &c.

The Schedule referred to by the above written Indenture.

[See the subdivisions of the schedule of which the form is given at the end of the appointment and release in Appendix No. 1.]

THE END.

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